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No. 01-

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 385 (1994), that "a so-called flow control ordinance, which require[d] all solid waste to be processed at a designated transfer station before leaving the municipality," violated the Commerce Clause because it "depriv[ed] competitors, including out-of-state firms, of access to a local market." The question presented is whether the prohibition against "hoard[ing] solid waste" (*id.* at 392) recognized in *Carbone* is inapplicable when the "preferred processing facility" (*ibid.*) is owned by a public entity.

RULE 29.6 STATEMENT

None of petitioners has a parent company and no publicly held company owns 10% or more of the stock of any of the petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners United Haulers Association, Inc., Transfer Systems Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc., and Ingersoll Pickup Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 261 F.3d 245. The Memorandum-Decision and Order of the United States District Court for the Northern District of New York granting plaintiffs summary judgment (App., *infra*, 34a-48a) is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on July 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Section 2(d) of Oneida County Board of Legislators Resolution No. 301 provides in relevant part:

> From the time of placement of solid waste and of recyclables at the roadside or other designated area approved by the County, or by the [Oneida-Herkimer Solid Waste Management] Authority pursuant to contract with the County, by a person for collection in accordance herewith, such solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the Authority.

Resolution No. 301 is set forth in full at App., *infra,* 49a-62a.

Section 2(c) of Herkimer County Local Law, Introductory No. 1 - 1990, provides in relevant part:

> After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the [Oneida-Herkimer Solid Waste Management] Authority pursuant to contract with the County.

Herkimer County Local Law, Introductory No. 1- 1990, is set forth in full at App., *infra,* 63a-76a.

Article I, Section 8 of the U.S. Constitution provides in relevant part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

STATEMENT

In *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994), this Court held invalid under the dormant Commerce Clause a local ordinance that required all municipal solid waste within the town to be delivered to a transfer station that was built by a private company at the town's instigation and that was to be sold to the town for $1 after five years (the time it was expected to take the private entity to recoup its investment). The facts of the present case are virtually identical, except the designated transfer station in this case, although constructed and operated by a private company, has been owned from day one by a public entity. The court of appeals concluded that this distinction made a case-dispositive difference, holding that there can be no discrimination against interstate commerce when the business being favored is publicly owned. This holding threatens to render *Carbone* a

dead letter (and to incite the kind of balkanization that the Commerce Clause was designed to forestall) because it is a simple matter for municipalities to structure (or restructure) transactions so that they have record title to the preferred facility. Because municipalities around the country have been steadfastly seeking to impose flow control notwithstanding the dictates of *Carbone,* the question whether *Carbone* can be so easily circumvented is one of great significance that warrants this Court's immediate attention.

The pertinent facts are simple and undisputed.

1. *Waste Collection in Oneida and Herkimer Counties.* Oneida and Herkimer Counties are sparsely populated counties in upstate New York. Historically, collection of trash has been a private function in these counties. Unlike Washington, D.C., New York City, or some other metropolis, most local governments in Oneida and Herkimer Counties have never assumed responsibility for the collection of trash from their residents.[1]

2. *The Imposition of Flow Control in Oneida and Herkimer Counties.* In September 1988, at the request of Oneida and Herkimer Counties, the New York State Legislature created the Oneida-Herkimer Solid Waste Management Authority ("the Authority"). App., *infra,* 4a, 36a. In May and December 1989, the Authority entered into contracts with the Counties that required the Authority to purchase, operate, construct, and develop facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties. For their part, the Counties agreed to ensure the delivery of all solid waste generated within their borders to facilities designated by the Authority. *Id.* at 4a-5a, 36a-37a.

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[1] In most parts of Oneida and Herkimer Counties, residents and businesses must make their own arrangements with private haulers. However, at least one city (Utica) has traditionally contracted with a private hauler on behalf of all of its residents.

Pursuant to the December 1989 contract, the Authority agreed to issue and sell bonds to finance the Counties' solid waste management plans, and the Counties agreed to pay any shortfall between the Authority's operating expenses and its revenues (*e.g.*, tipping fees and income from the sale of recyclables). *Id.* at 5a, 37a.

In December 1989, Oneida County passed the required flow control ordinance. The ordinance specifies that all solid waste and recyclables left at curbside must "be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority * * *." App., *infra*, 53a-54a. Under the ordinance, any hauler handling waste generated in the County must have a valid permit issued by the County or the Authority (*id.* at 58a-59a) and must deliver all construction debris, green waste, commercial and industrial waste, curbside recyclables, major appliances and tires, household hazardous waste and infectious waste to designated facilities (*id.* at 55a-58a). Penalties for noncompliance include permit revocation, fines, and imprisonment (*id.* at 59a, 60a-61a). Herkimer County enacted an almost identical flow control ordinance in February 1990. App., *infra*, 63a-76a.

The Authority's Solid Waste Plan expressly contemplates "the development of a new long-term landfill site to accommodate the non recyclable portion of the waste stream" of the two Counties. 2d Cir. J.A. 210.[2] Pending development of its own landfill, however, the Authority needed to construct a local transfer station to store, transfer and consolidate municipal solid waste. In June 1991, after issuing a request for proposals and considering the responses it received, the Authority contracted with a private entity (Empire Sanitary Landfill of Taylor, Pennsylvania ("Empire")) for the design, construction and operation of a transfer station in Utica, Oneida County, with subsequent disposal of the waste in Empire's

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[2] Citations to the joint appendix in the Second Circuit are designated "2d Cir. J.A. __."

landfill in Pennsylvania. App., *infra,* 7a.[3] The contract required the Authority to divert all solid waste generated in the Counties (except recyclables and waste burned at the Authority's incinerator) to the Utica Transfer Station. 2d Cir. J.A. 278, 290. Consistent with this agreement, the Authority's 1995 Rules and Regulations expressly require haulers to "deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility." App., *infra,* 8a; 2d Cir. J.A. 451.

In 1995, the Authority designated five Authority-owned facilities for the processing and/or disposal of solid waste and recyclables generated in the Counties — an incinerator, a recycling center, an ash landfill, a green waste compost facility, and the Utica Transfer Station. 2d Cir. J.A. 457-458. At that time, the monopolistic tipping fee at the transfer station was $86 per ton; that fee was doubled for waste requiring witnessed disposal or containing more than 25% of recyclables. App., *infra,* 8a-9a; 2d Cir. J.A. 455. As the Second Circuit recognized, "[e]ven the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides." App., *infra,* 9a. Indeed, petitioners submitted evidence that, if permitted to do so, they could dispose of waste they collect in Oneida and Herkimer Counties at out-of-state facilities at a cost of as little as $26 per ton. 2d Cir. J.A. 463, 464; see also *id.* at 429-430, 440-441 ($37 per ton to $55 per ton, including transportation); *id* at 446-447 ($39.20 per ton, including transportation, for construction and demolition waste).

3. *Proceedings below.* In April 1995, petitioners — six haulers that do business in Oneida and Herkimer Counties and a trade association — filed suit in the United States District

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[3] The agreement with Empire expired in 1998, at which time Waste Management of New York was selected to operate the transfer station. App., *infra,* 7a.

Court for the Northern District of New York against the Authority and both Counties, alleging, *inter alia,* that the flow control ordinances and the Authority's Rules and Regulations (collectively "the flow control laws") violate the dormant Commerce Clause and that, in enforcing those laws, defendants deprived them of their constitutional rights in violation of 42 U.S.C. § 1983. On March 31, 2000, the district court (Pooler, J., sitting by designation) granted plaintiffs' motion for summary judgment, concluding that the flow control laws violated the dormant Commerce Clause and that enforcement of those ordinances was in violation of Section 1983.

The district court found the unconstitutionality of the flow control laws to be conclusively established by *Carbone.* It explained:

> These flow control laws are virtually indistinguishable from the laws examined and struck down in both *Carbone* and *SSC Corp.* [*v. Town of Smithtown,* 66 F.3d 502 (2d Cir. 1995)]. * * * Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause. * * * I accordingly conclude that the flow control laws in Oneida and Herkimer counties also violate the dormant commerce clause. The laws are discriminatory and *per se* invalid.

App., *infra,* 42a-43a.

The court rejected defendants' contention that the challenged laws could be distinguished on the ground that they constitute "an inextricable part of a public waste management system for the local management of local waste," stating: "the relevant case law consistently has extracted flow control laws as an improper element of general waste management schemes." *Id.* at 44a. And in response to defendants' argument that "they merely have restructured the private collection market and prohibited haulers from crossing over into the disposal market," the district court explained:

> [T]he flow control laws dictate where the haulers must bring local solid waste and at what price. Although defendants contend repeatedly that their system treats all parties alike with respect to disposal services, what they actually are doing is hoarding all local solid waste for the benefit of a preferred local disposal facility.

Id. at 45a.

Finally, the district court rejected defendants' contention that summary judgment was premature because they had not yet received discovery, stating:

> To the extent that any factual issues exist, they are not material to my decision regarding the constitutionality of the flow control laws. The laws and regulations speak for themselves and are not disputed. The discriminatory effects of flow control also are a settled matter of law after the Supreme Court's decision in *Carbone,* and defendants offer no new arguments on this point.

Id. at 44a.

Having found the flow control laws unconstitutional, the district court enjoined their enforcement and referred the matter to the magistrate judge for determination of damages. *Id.* at 45a. Defendants appealed under 28 U.S.C. § 1292(a)(1).

The Second Circuit reversed. It concluded that "the district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility" and held that "a municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities." App., *infra,* 19a.

The court professed uncertainty as to whether this Court had rejected the "public/private distinction" in *Carbone,* stating that the *Carbone* majority's "language can fairly be described

as elusive on that point." *Id.* at 25a. It then proceeded to distinguish the "local processing cases" relied upon by the Court in *Carbone* on the ground that the favored businesses in each case were private entities. *Id.* at 25a-27a. At the same time, the Second Circuit identified no case from any court upholding a local processing law that favored a publicly owned business. Instead, it treated the fact that the local processing cases involved private businesses as "precedential support" for its conclusion (*id.* at 30a) and reasoned that "[t]he common thread in the Court's dormant Commerce Clause jurisprudence, highlighted in the local processing cases * * *, is that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition" (*id.* at 27a (emphasis in original)). Relying on Justice Souter's dissent in *Carbone,* the Second Circuit found there to be "sound reason for the Court's consistent, although often unstated, recognition of the distinction between public and private ownership of favored facilities," namely that "'[r]easons other than economic protectionism are . . . more likely to explain the design and effect of an ordinance that favors a public facility.'" *Ibid.* (quoting *Carbone,* 511 U.S. at 421 (Souter, J., dissenting)). See also *id.* at 28a-29a (quoting additional reasoning from Justice Souter's dissent).

Having embraced the public/private distinction, the court proceeded to dismiss the numerous cases that have struck down flow control laws that favored publicly owned waste disposal facilities on the ground that "their holdings are not binding on our determination and have little persuasive value given that the courts did not directly address the issue we decide today." *Id.* at 30a. As for the one case that did directly address the issue — *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Auth.*, 877 F. Supp. 935, 943 (M.D. Pa. 1994) — the Second Circuit stated: "We believe that it does not change the analysis and we respectfully disagree with that decision for the reasons already discussed." App., infra, 30a.

The court accordingly held that the district court erred in applying the strict level of scrutiny applicable to discriminatory legislation and instead should have applied the more lenient balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Although admitting that it was tempted to apply *Pike* itself (and presumably uphold the laws under it), the court satisfied itself with remanding the case to the district court with a very strong hint as to how to rule. See App., *infra*, 31a (emphasizing the "well-settled principle that waste disposal is a traditional local government function"); *id.* at 32a (noting that "[i]n the past, we have held that a municipality has legitimate — indeed, compelling — interests that are served by its waste management program") (internal quotation marks and citation omitted); *ibid.* (stating that "the fact that a municipality is acting within its traditional purview must factor into the district court's determination of whether the local interests are substantially outweighed by the burdens on interstate commerce").

REASONS FOR GRANTING THE PETITION

Since this Court's decision in *Carbone*, courts around the country have assumed — correctly, we submit — that municipalities are constitutionally precluded from requiring that local waste be processed and/or disposed of locally regardless of the identity of the record title owner of the preferred local facility. The decision below represents a dramatic departure from this otherwise uniform understanding of *Carbone*. If allowed to stand, that decision will provide a clear road map for circumventing *Carbone*. It can fairly be expected that the many municipalities whose flow control ordinances fell in the wake of *Carbone* will attempt to resuscitate those ordinances under the new theory that *Carbone* is inapplicable to laws that require the delivery of waste to publicly owned facilities. Certiorari is warranted because the decision below unduly narrows *Carbone*, is out of step with this Court's renunciation of the use of formalistic distinctions in resolving Commerce Clause challenges, is in severe tension

with this Court's "market participant" case law, is inconsistent with numerous cases that have struck down flow control ordinances directing that waste be brought to publicly owned facilities, and will have the inevitable consequence of reviving efforts to impose flow control throughout the country, thereby impeding interstate commerce in waste.

A. The Second Circuit's Decision Is Inconsistent With *Carbone*.

1. *Carbone* involved an ordinance that required that all solid waste within the defendant town's borders be brought for processing to a particular transfer station designated by the town. The transfer station was constructed by a private entity, which, by agreement with the town, was to operate the facility for five years, whereupon the town was to purchase the facility for $1. 511 U.S. at 387. The town guaranteed that the facility would receive a minimum of 120,000 tons of waste annually and authorized the contractor to charge a tipping fee of $81 per ton, a rate that exceeded the one waste haulers would pay in the open market. *Ibid.* "The object of this arrangement was to amortize the cost of the transfer station: The town would finance the new facility with the income generated by the tipping fees." *Ibid.*

This Court held that, because the town's flow control ordinance "attains this goal by depriving competitors, including out-of-state firms, of access to a local market, * * * the flow control ordinance violates the Commerce Clause." *Id.* at 386. It explained that, in the context of flow control laws, "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Id.* at 391. "With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town." *Ibid.*

The Court saw the challenged flow control ordinance as "just one more instance of local processing requirements that we long have held invalid." *Ibid.* It stated:

> The essential vice in laws of this sort is that they bar the import of the processing service. * * * The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility. * * * The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Id. at 392. Having found the ordinance to discriminate against interstate commerce, the Court proceeded to determine that flow control is not the least discriminatory means of achieving any legitimate local interest (*id.* at 392-394) and accordingly held that the ordinance violated the Commerce Clause.

Justice O'Connor concurred in the judgment. She was of the view that the flow control ordinance did not discriminate against interstate commerce because "the garbage sorting monopoly is achieved at the expense of all competitors, be they local or nonlocal." *Id.* at 404. She nevertheless concluded that the ordinance failed the *Pike* balancing test. She explained that, in ascertaining the burden on commerce, it is necessary to consider "what effect would arise if not one, but many or every, jurisdiction adopted similar legislation." *Id.* at 406 (internal quotation marks and brackets omitted). Justice O'Connor observed that "pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent." *Ibid.* She therefore concluded that "the burden [the challenged flow control ordinance] imposes on interstate commerce is excessive in relation to [the town's] interest in ensuring a fixed supply of waste to supply its project." *Id.* at 407.

Justice Souter (joined by the Chief Justice and Justice Blackmun) dissented. The dissenters were of the view that the majority had "underestimate[d] or overlook[ed]" "both analytical and practical differences between this and the earlier [local] processing cases" that "should prevent this case from

being decided the same way." *Id.* at 416. Specifically, the dissenters argued, "***the one proprietor * * * favored [by the challenged flow control ordinance] is essentially an agent of the municipal government*** * * *. Any discrimination worked by [the ordinance] thus fails to produce the sort of entrepreneurial favoritism we have previously defined and condemned as protectionist." *Ibid.* (emphasis added). The dissenters further explained:

> While our previous local processing cases have barred discrimination in markets served by private companies, ***Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to revert entirely to municipal ownership.*** * * * The majority ignores this distinction between public and private enterprise, equating [the ordinance's] "hoard[ing]" of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms. * * * Reasons other than economic protectionism are * * * more likely to explain the design and effect of an ordinance that favors a public facility. * * * ***An ordinance that favors a municipal facility, in any event, is one that favors the public sector,*** and if we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position, then surely this Court's dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.

Id. at 419-421 (emphasis added; internal quotation marks, citations, and footnote omitted). The dissenters concluded that the ordinance should be upheld because it "conveys a privilege ***on the municipal government alone,*** the only market

participant that bears responsibility for ensuring that adequate trash processing services continue to be available to Clarkstown residents." *Id.* at 430 (emphasis added).

2. The Second Circuit's assertion that this Court had not already considered and rejected the public/private distinction in *Carbone* is untenable. That distinction was the centerpiece of a vigorously argued dissent. Obviously aware of this central contention of the dissent, the Court nonetheless stated that, "having elected to use the open market to earn revenues for ***its*** project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State." *Id.* at 394 (emphasis added). This Court thus evidently (and, quite correctly, under the circumstances) regarded the fact of ownership as a formality: as the dissent itself contended, for all practical purposes, the transfer station was "essentially a municipal facility" (*id.* at 419), which was to be formally transferred to the town the following year. Indeed, if it had intended its holding to preclude the flow control ordinance only for the year until the town was to receive record title to the facility, the Court surely would have said so.

Moreover, the core reasoning of the majority opinion applies fully regardless of the identity of the owner of the preferred facility. As the Court observed:

> The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.

Id. at 390. Local processing laws run afoul of this "central rationale" because "they bar the import of the processing service." *Id.* at 392. Specifically, the challenged flow control ordinance impermissibly discriminated because "it allow[ed] only the favored operator to process waste that [was] within the limits of the town." *Id.* at 391.

Whether the owner of the preferred facility is a private business or a public entity, a flow control law, by "allow[ing] only the favored operator to process waste that is within the limits of the town," constitutes "economic protectionism" of that preferred local facility and threatens to result in "retaliatory measures." Indeed, as discussed further below, if the Second Circuit's public/private distinction is left standing, it is predictable that municipalities around the country will take advantage of the ruling to establish (or revive) their own flow control laws, with the result being that interstate commerce in the service of waste processing will be dramatically impeded.

In short, *Carbone* did, at least implicitly, reject the public/private distinction, and the Second Circuit's adoption of that distinction therefore conflicts with *Carbone*.

B. The Second Circuit's Decision Is Irreconcilable With This Court's Renunciation Of The Use Of Formalistic Distinctions In Resolving Commerce Clause Challenges.

Under the Second Circuit's decision, the validity of flow control turns almost entirely on the identity of the record title owner of the preferred facility. If legal title to a facility is in the name of a private entity, a law requiring that waste be delivered to that facility is subject to the Court's virtually *per se* rule of invalidity. If legal title to a facility is in the name of a public entity — even if constructed and operated by a private entity — the very same law would be evaluated under the more deferential *Pike* test. The effect of the law on interstate commerce is precisely the same, yet the result couldn't be more different.

The Second Circuit's decision, in short, exalts form over substance. In so doing, it deviates markedly from this Court's modern Commerce Clause jurisprudence, which has steadfastly "eschewed formalism" in favor of "a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). See also *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 373 (1991) ("[w]e

seek to avoid formalism and to rely upon a consistent and rational method of inquiry") (internal quotation marks omitted). For example, during the middle part of the twentieth century, the Court drew a distinction between taxes on the privilege of engaging in interstate commerce and taxes on the privilege of using a state's highways, holding the former unconstitutional and the latter permissible. Later, however, the Court renounced this distinction as "a triumph of formalism over substance" (*Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 281 (1977) that "allowed the validity of statutes to hinge on 'legal terminology,' 'draftsmanship and phraseology'" (*Quill Corp. v. North Dakota,* 504 U.S. 298, 310 (1992) (quoting *Complete Auto,* 430 U.S. at 281)).

The public/private distinction embraced by the Second Circuit is a throwback to the formalism that this Court has renounced. Review is warranted to bring the Second Circuit back in line with what the Court has determined to be the appropriate focus: "whether the [challenged law] produces a forbidden effect" (*Complete Auto,* 430 U.S. at 288).

C. The Second Circuit's Decision Is In Tension With This Court's "Market Participant" Case Law.

This Court's "market participant" doctrine provides that the strictures of the dormant Commerce Clause do not apply when a state or local government "is acting as a market participant, rather than as a market regulator." *South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82, 93 (1984) (plurality op.). This doctrine "is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity." *Id.* at 97. To the contrary, the doctrine "allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have

a substantial regulatory effect outside of that particular market." *Ibid.*[4]

Here, it is unquestionable that the market participant doctrine does not immunize respondents' laws requiring that waste collected by private haulers within the boundaries of Oneida and Herkimer Counties be brought to the Authority's transfer station for processing. Indeed, the Second Circuit so recognized. See App., *infra,* 15a ("The Counties' flow control laws require private haulers to obtain a permit from the Counties and to deliver all waste to Authority designated facilities. Failure to do either exposes the private hauler to fines, revocation of its permit to pick up solid waste, and imprisonment. Therefore, the Counties have availed themselves of the unique powers or special leverage they enjoy by virtue of their status as sovereigns and, thus, are regulating the market for waste collection and disposal.") (brackets and citations omitted).

Yet in holding that respondents' ownership of the facility they have ordered petitioners to utilize renders the flow control laws non-discriminatory (and hence subject only to a deferential balancing test, the outcome of which the court has already largely prejudged), the Second Circuit has given state and local governments the very *carte blanche* this Court has denied them under the market participant doctrine. If the Second Circuit's decision is allowed to stand, state and local

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[4] It merits mention that, in the case in which the Court first recognized the market participant doctrine, the Court found it significant that "the commerce affected by the [challenged law] appears to have been created, in whole or in substantial part, by the [overall program of which the challenged law was a part]." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 n.18 (1976). See also *id.* at 815-816 (Stevens, J., concurring). The present case presents the flip side of this situation: commerce in processing services and recyclables pre-dated respondents' entry into the waste processing business and, by fiat, respondents have arrogated to themselves all of that pre-existing commerce.

governments could be emboldened to enter any number of markets and then use their regulatory powers to favor themselves over their private interstate competitors. Although such self-dealing would not entirely be immunized from scrutiny under the dormant Commerce Clause, the notion that it need only survive the *Pike* balancing test is in significant tension with the Court's strongly expressed concern that the market participant doctrine not "swallow[] up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry." *South-Central Timber*, 467 U.S. at 98 (plurality op.).

D. The Second Circuit's Decision Is Inconsistent With Those Of Numerous Other Courts That Have Invalidated Flow Control Laws That Required Waste To Be Brought To Publicly Owned Facilities.

The Second Circuit's end-run around *Carbone* places it in tension with *every* other court that has considered a challenge to a flow control law that required waste to be brought to a publicly owned facility. See *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 715-16 (6th Cir. 2000) (ordinance that required all waste to be processed at county-owned transfer station discriminated against interstate commerce); *Waste Mgmt., Inc. v. Metropolitan Gov't*, 130 F.3d 731, 733, 736 (6th Cir. 1997) (striking down flow control ordinance that required all residential waste to be disposed of at publicly owned facility); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794 (3d Cir. 1995) (two of the three designated facilities in one of two consolidated cases were publicly owned; case remanded for determination of whether process of designating facilities was discriminatory); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995) (holding that New Jersey regulations requiring flow control discriminated against interstate commerce and making no distinction based on whether preferred facility is publicly or privately owned); *Waste Sys. Corp. v. County of*

Martin, 985 F.2d 1381, 1383 (8th Cir. 1993) (striking down flow control ordinance that required all waste to be delivered to facility built and owned by waste district); *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.,* 1996 WL 612465, at *1-*3, *10 n.13 (D. Minn. July 2, 1996) (striking down flow control ordinance that required all waste to be disposed of at facility owned by waste district because "the District has not shown and, in fact, it cannot show, that out-of-state disposal facilities competed, on a level playing field, when the District designated its own facility as the sole solid waste processing center"); *Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.,* 877 F. Supp. 935, 943 (M.D. Pa. 1994) (indicating that it was "not persuaded that the public nature of the [designated] facility changes the applicable analysis" in part because the *Carbone* dissent pointed out that the facility at issue there "was built and operated pursuant to a contract with the municipality, performed a traditional municipal function and was soon to revert to municipal ownership," but "[t]hese facts did not persuade the majority that the regime was non-discriminatory or that the less stringent *Pike* analysis should apply"); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.,* 814 F. Supp. 1566 (M.D. Ala. 1993) (striking down flow control ordinance that required all waste to be disposed of at publicly owned facility), aff'd per curiam, 29 F.3d 641 (11th Cir. 1994); *Heier's Trucking, Inc. v. Waupaca County,* 569 N.W.2d 352 (Wis. Ct. App. 1997) (affirming trial court order striking down ordinance that required all recyclables collected in participating municipalities to be delivered to Waupaca County Processing Facility).

To be sure, as the Second Circuit pointed out, most of these cases did not expressly address the public/private distinction. However, in light of the fact that the distinction was expressly advocated in Justice Souter's dissent in *Carbone,* it is inconceivable that these courts simply overlooked this potentially case-dispositive basis for distinguishing *Carbone.*

It is far more likely that they, like the district court in *Southcentral Pennsylvania Waste Haulers*, simply found the distinction unavailing. Because there can be little question that this case would have been decided differently had it arisen in the Third, Sixth, or Eighth Circuits, the Second Circuit's adoption of the public/private distinction creates disharmony among the federal courts of appeals that should be resolved now.

E. The Issue Presented Is An Important One That Requires The Court's Immediate Attention.

In her concurring opinion in *Carbone*, Justice O'Connor observed:

> Over 20 states have enacted statutes authorizing local governments to adopt flow control laws.[5] If the localities in these States impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, ***pervasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent.***

511 U.S. at 406 (emphasis added; footnote omitted).

As the post-*Carbone* case law reflects, that prediction was hardly an exaggeration. Since *Carbone*, the courts have adjudicated numerous challenges to state or local flow control provisions. In addition to the ones cited in the preceding section, courts have invalidated at least four other flow control provisions. See *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000); *Ben Oehrleins & Sons & Daughter v.*

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[5] As of 1995, at least 39 states and the District of Columbia had authorized localities to impose flow control. See United States Environmental Protection Agency, *Report to Congress: Flow Controls and Municipal Solid Waste* II-1 to II-5 (Mar. 1995).

Hennepin County, 115 F.3d 1372, 1384-1385 (8th Cir. 1997); *SSC Corp. v. Town of Smithtown,* 66 F.3d 502 (2d Cir. 1995); *Coastal Carting Ltd. v. Broward County,* 75 F. Supp. 2d 1350 (S.D. Fla. 1999).

Moreover, in an effort to comply with *Carbone,* while still garnering as much of the economic benefits of flow control as possible, several municipalities have adopted (and courts have upheld) laws imposing "intra-state" flow contro — *i.e.,* they impose flow control except insofar as waste is destined for disposal out of state. See, *e.g., On the Green Apartments L.L.C. v. City of Tacoma,* 241 F.3d 1235 (9th Cir. 2001); *Ben Oehrleins,* 115 F.3d at 1385-1387; *Vince Refuse Serv., Inc. v. Clark County Solid Waste Mgmt. Dist.,* 1995 WL 253121 (S.D. Ohio Mar. 7, 1995). But see *Randy's Sanitation, Inc. v. Wright County,* 65 F. Supp. 2d 1017 (D. Minn. 1999) (intrastate flow control ordinance unconstitutionally burdened interstate commerce). If the Second Circuit's decision is left standing, some or all of these municipalities surely will seek to take ownership of their preferred facilities (if they don't own them already), which would then enable them to eliminate the exception in their flow control ordinances for waste destined for disposal in other states.

In addition, as the outpouring of governmental amicus briefs in *Carbone* reflects, the published cases are just the tip of the iceberg. Those amicus briefs indicate that, as of the time *Carbone* was being briefed, literally dozens of municipalities around the country had enacted or intended to enact flow control provisions. See, *e.g.,* Brief of *Amici Curiae* Solid Waste Association of North America et al. in Support of Respondent at 5 (amicus brief of eleven municipal waste authorities in nine states, plus a national association, asserting that "[f]or the *amici,* flow control is a rational, nondiscriminatory mechanism for the interactive and complementary use of [their] waste management methods as part of an environmentally sound strategy for municipal solid waste management"); Brief for *Amici Curiae* Prince George's

County, Maryland and Carroll County, Maryland in Support of Respondent at 1-2 (indicating that Prince George's County had already adopted flow control and that Carroll County was contemplating adopting flow control); Brief of Amicus Curiae County of San Diego, California in Support of Respondent at 1-2 ("The County Disposal System serves vital health and safety interests and depends on 'flow control' for its very existence."); Brief of the State of New Jersey as Amicus Curiae in Support of the Respondent at 2-3 ("New Jersey's current Statewide solid waste management program is based upon a network of statutes and implementing administrative regulations which require that all locally generated solid waste be ultimately brought to designated local disposal or transfer facilities, all of which are franchised public utilities or are owned by government entities."); Brief of Amicus Curiae City of Springfield, Missouri in Support of Respondent at 2 (city enacted flow control in order to fund construction of a materials recovery and composting facility); Brief of Amici Curiae Town of Smithtown et al. in Support of Respondent at 1-2 (statement by a New York town, a New York county, and two New Jersey counties that, although they "have fulfilled their [waste management] responsibilities through different disposal means, * * * flow control mechanisms are fundamental to each *amici*'s [sic] success"); Brief *Amicus Curiae* of the Solid Waste Disposal Authority of the City of Huntsville, Alabama in Support of Respondent at 1-4 (describing city's flow control ordinance and asserting that "[t]he availability of funds for the payment of [the waste authority's] outstanding bonds depends upon its receipt * * * of *all* tipping fees with respect to the operation by the City of its Waste Collection and Disposal System") (emphasis in original); Brief Amici Curiae of City of Indianapolis et al. in Support of Respondent at 6 (amicus brief on behalf of ten cities, counties, and waste authorities in nine states, plus several associations, asserting that "[t]he present *amici* (or the communities that the organizational *amici* represent) * * * relied on waste management facility designation—flow control—ordinances as a key component of

[their] waste management decisions"); Brief of County of Rockland as *Amicus Curiae* in Support of Respondent at 4-9 (asserting that county must have the ability to impose flow control in order to pay for its planned recycling facility); Brief for the State of New York et al. as *Amici Curiae* in Support of Respondent at 1 ("New York State has authorized 38 localities and solid waste management units to enact flow control laws so that they can fulfill their responsibility for safe, environmentally-sound management of solid waste.").

As the amicus briefs further reflect, many of the affected counties and towns own the facilities that were the beneficiaries of their flow control ordinances. In the wake of the Second Circuit's decision, those counties and towns can be expected to reinstate their flow control ordinances. Moreover, it would be a simple matter for those towns and counties that do not currently own their preferred facilities to acquire them for $1 along with the promise of increased tipping fees that would be the inevitable result of the reinstitution of mandatory flow control.

In short, the decision below threatens to create a sea change. It is imperative that this Court review and reverse that decision now before the balkanization forecast by Justice O'Connor begins in earnest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2001

United States Court of Appeals,
Second Circuit.

UNITED HAULERS ASSOCIATION, INC., Transfer Systems Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc. and Ingersoll Pickup Inc.,
Plaintiffs-Appellees,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY,
County of Oneida and County of Herkimer,
Defendants-Appellants.

Docket Nos. 00-7593, 00-7595 and 00-7597.

Argued Dec. 19, 2000.
Decided July 27, 2001.

Before: MESKILL, LEVAL and CALABRESI, Circuit Judges.

MESKILL, Circuit Judge:

Defendants-appellants Oneida-Herkimer Solid Waste Management Authority (Authority) and the Counties of Oneida and Herkimer (Counties) appeal a March 31, 2000 order of the United States District Court for the Northern District of New York, Pooler, *Circuit Judge* sitting by designation, granting summary judgment in favor of plaintiffs-appellees United Haulers Association, Inc., Transfer Systems, Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc. and Ingersoll Pickup, Inc. (collectively "United Haulers") with respect to

defendants' liability under 42 U.S.C. § 1983, enjoining the enforcement of the Counties' solid waste laws and declaring those laws unconstitutional under the Commerce Clause.

We must decide whether the Counties' so-called "flow control" ordinances, which require that all waste generated within the Counties be delivered to one of five publicly owned facilities, are unconstitutional under the Commerce Clause. The district court found the flow control laws "virtually indistinguishable from the laws examined and struck down" in *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) (*Carbone*), and *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir.1995), and, therefore, held that the ordinances were unconstitutional.

We hold that because the favored facilities are publicly owned, the ordinances do not discriminate against interstate commerce, and therefore are not subject to the rigorous test set forth in *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). We remand to the district court to consider whether the ordinances impose burdens on interstate commerce that are clearly excessive in relation to the local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

BACKGROUND

The history of local solid waste regulation in the state of New York and across the country has been well documented. *See, e.g., Inc. Vill. of Rockville Ctr. v. Town of Hempstead*, 196 F.3d 395, 396-98 (2d Cir.1999); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 791-92 (3d Cir.1995). Thus, we only briefly discuss the events that prompted the Counties to implement their waste management scheme.

Historically, each city, town or village within the Counties was responsible for its own waste management. This

balkanization led to the proliferation of waste dumps of all sizes, and with varying degrees of environmental accountability. The environmental risks and liabilities became apparent in the 1980s when over 600 local businesses and several local municipalities and school districts were named as third-party defendants in a federal environmental clean-up action against the Ludlow Landfill in Oneida County. *See generally* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

This "solid waste crisis," as Oneida County describes it, and the increased environmental risks and exposure to federal and state liability which flowed from it, prompted the Counties to seek a solution. Like many of their municipal neighbors in New York and throughout the country, the Counties devised a comprehensive waste management system in an attempt to provide for the safe and cost effective disposal of their residents' solid waste. Like many of their municipal neighbors, the Counties' plan is now the subject of a constitutional challenge.

A. *The Counties' Solid Waste Management Solution*

Oneida and Herkimer Counties are located in central New York, in the Mohawk Valley, and together encompass over 2,600 square miles with a combined population of approximately 306,000 persons, residing in 78 different cities, towns and villages. Both Counties are municipal corporations of the state of New York, and together constitute a single "planning unit" under the New York State Solid Waste Management Plan and its authorizing legislation. *See* N.Y. Envtl. Conserv. L. § 27-0107(1)(a).

In late 1987, the Counties entered into a municipal contract for the purpose of coordinating and consolidating the management of their solid waste. To that end, they hired a consulting firm to prepare an environmental statement and solid

waste management plan. The statement and plan contemplate the construction of six facilities collectively to manage the Counties' solid waste: a recycling center, a compost facility, a transfer station, a waste-to-energy plant, an ash landfill and a C & D (construction and demolition) debris landfill. The estimated cost of these facilities was $155-200 million.

The Counties requested that then-Governor Cuomo and the New York State Legislative Commission on Solid Waste Management (Commission) create a waste management authority to assume the Counties' joint waste management responsibilities. The Governor and Commission complied by creating the Authority, a public benefit corporation authorized by the Oneida-Herkimer solid waste management authority act of 1988(Act). *See generally* N.Y. Pub. Auth. L. § 2049-aa. The Authority has the power, among other things, to collect, process and dispose of solid waste generated in the Counties. Moreover, the Act permits the Counties to contract with the Authority to obligate the Counties to ensure the continued operation and solvency of the Authority. *See id.* at §§ 2049-ee and tt. As amended in 1990, the Act prohibits the Authority from accepting solid waste (other than recyclable material) from outside of the Counties. *See id.* at §§ 2049-ee(4) and (7).

1. *Agreements Between the Counties and the Authority*

On May 10, 1989, the Authority and the Counties entered into a Solid Waste Management Agreement, in which the Authority agreed to manage and dispose of all solid waste within the Counties. In particular, the Authority agreed to take control of the operation of the Oneida County Energy Recovery Facility and the Oneida-Herkimer Recycling Center (Recycling Center) beginning on January 1, 1990, and to collect "tipping fees" sufficient to pay its operating and maintenance costs. *See SSC Corp.*, 66 F.3d at 505 n. 5 (describing "tipping fee" as an industry term for a disposal charge or gate fee). The Authority

assumed the Counties' regulatory powers with regard to private haulers operating within the Counties. For their part, the Counties agreed to direct all recyclables to the Recycling Center and agreed to direct all solid waste generated in the Counties to facilities designated by the Authority.

On December 28, 1989, the Authority and the Counties entered into a second solid waste management agreement. In that agreement, the Authority reaffirmed its obligations under the first agreement and the Counties agreed to pay the Authority's operating costs and debt service to the extent those costs were not recouped through tipping fees and other disposal related charges.

2. *The Local Laws*

In December 1989, the Oneida County Board of Legislators enacted Local Law No. 1 of 1990, Oneida's flow control law. The law requires that all solid waste generated within the County be picked up by the municipality, a licensed private hauler or the generator, and delivered to certain approved processing sites designated by the Authority.[1] Accordingly, private haulers must obtain a permit from the Authority to pick up solid waste in the Counties. Failure to deliver that waste to the designated facilities subjects the

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[1] Section 2(a) of the Oneida Local Law provides:

> In order to provide for public health and safety and to facilitate the conservation of vital resources: Each person shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator *to a disposal location approved by the County.*

(emphasis added).

private hauler to revocation of its permit, fines and imprisonment.

Two months later, in February 1990, the Herkimer County Legislature enacted Herkimer County Local Law No. 1 of 1990, Herkimer's flow control law, which is substantially similar to the Oneida flow control law.[2]

3. *Authority Activities*

Between 1990 and 1992 the Authority issued over $51 million in bonds to finance the designated facilities, to construct the Green Waste Compost Facility and the Utica Transfer Station, and to refinance prior bonds. The Authority owns all five designated facilities and operates all but the Utica Transfer Station.

a. *Utica Transfer Station Operating Agreement*

In 1991, the Authority accepted bids for the operation of the Utica Transfer Station. The bidding process was open to all private waste disposal companies, in-state and out-of-state. The Authority received four bids, all from out-of-state businesses, which proposed delivery of the solid waste at the transfer station to eight landfills, seven of which were located outside of New York.

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[2] Section 2(c) of the Herkimer Local Law provides:

> After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material *shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County.*

(emphasis added).

In June 1991, the Authority entered into a contract with Empire Sanitary Landfill, Inc. (Empire) to operate the Utica Transfer Station. Pursuant to that contract, Empire transported all solid waste processed at the transfer station to Empire's landfill in Taylor, Pennsylvania for disposal. The Authority agreed to deliver or cause to be delivered all solid waste generated or originating in the Counties (other than recyclables and waste burned at the Energy Recovery Facility) to the transfer station. The parties extended the contract to span the period 1995 to 1998.

In 1998, the Authority again accepted bids from private waste disposal companies. This time, Waste Management of New York (Waste Management), a Delaware limited liability company, prevailed. Waste Management agreed to dispose of the waste processed at the transfer station at two facilities, one located in-state and the other located in Erie, Pennsylvania. Waste Management continues to operate the transfer station on behalf of the Counties.

In the May 20, 1991 Final Local Solid Waste Management System Plan for the Counties, the Authority contemplates the development of additional facilities "to provide for *all* components of the waste stream for all residents of the two counties" (emphasis added). The Authority expressly states in the Plan that it "is wholly committed to the development of facilities within Oneida and Herkimer Counties to provide for the region's long-term needs." In other words, the current out-sourcing of the transfer station's operation is a temporary measure until the Authority brings into operation a County landfill, the last of the six facilities contemplated in the original environmental plan, and is otherwise able to meet all of the Counties' solid waste management needs.

b. *The Authority's Rules and Regulations*

Pursuant to the May and December 1989 agreements and the local flow control laws enacted by the Counties, the Authority has promulgated rules and regulations. The Authority's 1995 Rules and Regulations provide that private haulers "must deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility." The 1995 Rules and Regulations also require all private haulers to obtain a Solid Waste Collection and Disposal Permit from the Authority. The Authority sets the applicable tipping fees, designates access route patterns to four of the five designated facilities and retains the right to redirect "solid waste . . . to the appropriate facility according to waste production, waste origin, waste type, seasonal fluctuations or planned operating procedures." To enforce the Counties' local laws and the 1995 Rules and Regulations, the Authority employs "garbage cops" (as coined by United Haulers) to monitor private haulers' activities and ensure compliance with the flow control ordinances.

B. *Alleged Effect on Private Haulers*

The individual plaintiff haulers are four New York corporations and two New York sole proprietorships, each of which engaged in the collection, transport, processing and disposal of solid waste within the Counties. United Haulers Association, Inc. (Association) is a not-for-profit New York corporation comprised of solid waste management companies doing business within the Counties. Each of the individual plaintiffs is a member of the Association.

Under the 1995 Rules and Regulations, private haulers must pay the Authority a tipping fee of at least $86 per ton of solid waste disposed of at the Authority's facilities. If witnessed disposal is required or if the load contains more than 25% recyclables, the charge is increased to as much as $172 per

ton. Even the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides. But for the Counties' flow control laws, United Haulers claims that it could deliver and dispose of solid waste at other facilities within the state of New York or in other states at a lower price. United Haulers submitted affidavits from Jeff Bliss, President of Bliss Enterprises, Inc. and David N. Levitt, Vice President of Levitt's Commercial Containers, Inc., averring that out-of-state disposal facilities accessible to the haulers charged significantly lower tipping fees. For example, United Haulers claims that Greentree Landfill in Pennsylvania is capable of accepting municipal waste from the haulers at a tipping fee of $26-30 per ton. Therefore, according to United Haulers, the Counties' flow control laws bar them from accessing a viable, and significantly cheaper, interstate market for waste disposal.

C. *District Court Proceedings*

On April 14, 1995, United Haulers commenced the present action against the Counties and the Authority alleging that the flow control laws are unconstitutional and constitute a deprivation of United Haulers' constitutional rights. *See* 42 U.S.C. § 1983.

Soon thereafter, United Haulers moved for summary judgment, seeking an order (1) declaring that the flow control laws unconstitutionally discriminate and/or unduly burden interstate commerce in violation of the Commerce Clause, (2) enjoining the Authority and the Counties from enforcing the flow control laws, (3) declaring that the Counties and the Authority deprived United Haulers of rights, privileges or immunities secured by the Constitution, and (4) holding the Counties and the Authority liable for damages and attorney's fees under 42 U.S.C. § 1988.

United Haulers argued, as it does now, that "the recent and controlling decision by the United States Supreme Court in *C & A Carbone, Inc. v. Town of Clarkstown* establishes the unconstitutionality of the Flow Control Laws." *United Haulers* asserted that, like the laws stricken in *Carbone*, the Counties' flow control laws discriminate against interstate commerce to finance the Counties' solid waste management scheme. United Haulers pointed out that the flow control laws in this case are designed to support a much larger waste management system (almost 50 times more expensive) than that in *Carbone* and impact approximately three times more solid waste than in *Carbone*.

In opposition, the Counties and the Authority argued that they had adopted "an integrated system of solid waste disposal" to alleviate "important public health and environmental concerns" caused by the hodge-podge system of private enterprise and sub-standard disposal sites. They argued that the waste management system did not discriminate against or unduly burden interstate commerce under *Carbone*. Alternatively, they argued that they were entitled to further discovery pursuant to Fed.R.Civ.P. 56(e) and (f) to enable them to show that there were no alternative means to accomplish their legitimate goals. In their view, anything less than full discovery would "reward[ ] plaintiffs for their guerilla litigation strategy and punish[ ] the [defendants] in contravention of the intent and spirit of the Federal Rules of Civil Procedure."

Shortly after United Haulers moved for summary judgment, the Counties and the Authority answered the Complaint and served an initial set of interrogatories. At a June 1, 1995 scheduling conference, however, United Haulers requested a protective order staying discovery pending resolution of its motion. The magistrate judge granted the protective order suspending discovery. Accordingly, no discovery took place prior to the district court's determination

of United Haulers' summary judgment motion that is the subject of this appeal.

The district court heard oral argument on United Hauler's motion for summary judgment in October 1995. Almost five years later, on March 31, 2000, the district court entered an order granting United Haulers' motion. The district court declared the flow control laws unconstitutional and enjoined the Counties and the Authority from enforcing them. After concluding that the Association did not have standing to assert a section 1983 damages claim, the district court granted summary judgment in favor of the individual haulers on that claim and referred the action to a magistrate judge for calculation of damages.

The Counties and the Authority filed timely notices of appeal on April 28, 2000. We heard argument on December 19, 2000, and following argument solicited supplemental briefing from the parties on several issues. We now reverse and remand.

DISCUSSION

In 1996, we remarked that the federal docket was "clogged with—of all things—garbage." *SSC Corp.*, 66 F.3d at 505. It remains so today. *See, e.g., Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544 (6th Cir.2001); *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir.2001); *see generally* Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion about the Dormant Commerce Clause*, 50 Okla. L.Rev. 155, 156 (1997) (noting that garbage cases lie "on the cutting edge of dormant Commerce Clause theory").

Although the Supreme Court's and this Court's recent spotlight on local, solid waste regulation provides us with a framework within which to analyze this challenge, many questions remain unanswered with respect to the

constitutionality of municipal flow control laws. *See generally* Colin A. Fieman, *The Second Circuit Upholds Waste Management Systems in the Wake of* Carbone *v.* Clarkstown: *The Decisions in* USA Recycling, Inc. *v.* Town of Babylon *and* SSC Corp. *v.* Smithtown, 23 Fordham Urb. L.J. 767, 769 (1996) ("[A]lthough the Second Circuit has made considerable progress in clarifying the law in this area, it has left questions about the constitutionality of flow control unanswered."). Unfortunately, these missing pieces to the constitutional puzzle often force states and municipalities to engage in guesswork about the constitutionality of proposed solid waste management schemes, which are expensive and time-consuming to implement. *See generally, e.g.*, Jennifer M. Anglim, *Note, The Need for a Rational State and Local Response to* Carbone: *Alternate Means to Responsible, Affordable Municipal Solid Waste Management*, 18 Va. Envtl. L.J. 129, 130-32 (1999) ("[T]he federal municipal solid waste . . . management jurisprudence has followed intertwined and often-conflicting legal theories and precedents, making it difficult for states and municipalities to plan."). With frequent reference to the guiding principles underlying the Supreme Court's dormant Commerce Clause jurisprudence, we attempt to fill in one more piece of this puzzle.

A. *Legal Background*

The Commerce Clause states that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. On its face, the clause does not speak to the power, if any, of the states to regulate interstate commerce. Although the Supremacy Clause prohibits state regulation of interstate commerce in areas where Congress has spoken, *see* U.S. Const. art. VI, cl. 2, neither the text of the Commerce Clause nor the Supremacy Clause "say what the states may or may not do in the absence of congressional action." *Dep't of*

Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 749, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978) ("The Commerce Clause does not state a prohibition; it merely grants specific power to Congress. The prohibitive effect of the Clause on state legislation results from the Supremacy Clause and the decisions of this Court."). That question did not remain open for long.

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824), Justice Johnson sowed the seeds for the "dormant" or "negative" Commerce Clause by arguing that the power to regulate interstate commerce could not rest with two sovereigns. *See id.* at 227 (Johnson, *J.*, concurring) (arguing that "since the power to prescribe the limits to . . . freedom [of commerce], necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive"); *see also id.* at 209 (Daniel Webster, as counsel, arguing that the Commerce Clause's affirmative grant to Congress "necessarily" prohibits local action that alters "what the regulating power designs to leave untouched"). In the years that followed, the Supreme Court consistently held that the Commerce Clause's affirmative grant of power to the federal government requires some concomitant limitation on the power of the several states. *See* Boris I. Bittker, *Regulation of Interstate and Foreign Commerce* § 6.01[A] (1999 & Supp.2001); *see also SSC Corp.*, 66 F.3d at 509 (noting that "federal courts have for more than 150 years invoked the Commerce Clause to scrutinize state regulations affecting interstate commerce").

Justice Jackson later expressed the rationale underlying the judicially created dormant Commerce Clause:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will

withhold his exports, and no foreign state will by customs duties or regulations exclude them.

H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 539, 69 S.Ct. 657, 93 L.Ed. 865 (1949); *see Carbone*, 511 U.S. at 390, 114 S.Ct. 1677 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."). Justice Jackson's "national market" has led to "material success . . . the most impressive in the history of commerce," *H.P. Hood & Sons*, 336 U.S. at 538, 69 S.Ct. 657, arguably because the Supreme Court "consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *Id.* at 535, 69 S.Ct. 657. *But see* Edmund W. Kitch, *Regulation, the American Common Market and Public Choice*, 6 Harv. J.L. & Pub. Pol'y 119, 123-24 (1982) (challenging the practical efficiency resulting from the Court's dormant Commerce Clause jurisprudence).

Not surprisingly, the Court's effort to preserve a national market has, on numerous occasions, come into conflict with the states' traditional power to "legislat[e] on all subjects relating to the health, life, and safety of their citizens." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). On these occasions, the Supreme Court has "struggled (to put it nicely) to develop a set of rules by which we may preserve a national market without needlessly intruding upon the States' police powers, each exercise of which no doubt has some effect on the commerce of the Nation." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 596, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (Scalia, *J.*, dissenting) (citing *Okla. Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 180-83, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)); *see generally* Boris I. Bittker, *Regulation of Interstate*

and Foreign Commerce § 6.01[A], at 6-5 ("[T]he boundaries of the [State's] off-limits area are, and always have been, enveloped in a haze."). Those rules are "simply stated, if not simply applied." *Camps Newfound/Owatonna*, 520 U.S. at 596, 117 S.Ct. 1590 (Scalia, *J.*, dissenting).

B. *Dormant Commerce Clause Analysis*

As a threshold matter, a court must determine whether a state or local government is "regulating" and, if so, whether that regulation affects interstate commerce. *See Carbone*, 511 U.S. at 389, 114 S.Ct. 1677; *On the Green Apartments L.L.C.*, 241 F.3d at 1241-42.

The dormant Commerce Clause restricts certain state regulation of interstate commerce. It does not prohibit a state from participating in the free market if it acts like a private enterprise. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 437, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980) ("There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."); *Sal Tinnerello & Sons v. Town of Stonington*, 141 F.3d 46, 55 (2d Cir.1998). In general, a state regulates when it exercises governmental powers that are unavailable to private parties. *See SSC Corp.*, 66 F.3d at 512. Classic hallmarks of government regulation include the threatened imposition of fines and/or jail terms to compel behavior. *See id.* The Counties' flow control laws require private haulers to obtain a permit from the Counties and to deliver all waste to Authority designated facilities. Failure to do either exposes the private hauler to fines, revocation of its permit to pick up solid waste, and imprisonment. Therefore, the Counties have "avail[ed themselves] of the unique powers or special leverage [they] enjoy[ ] by virtue of [their] status as sovereign[s]," *Inc. Vill. of Rockville Ctr.*, 196 F.3d at 399, and, thus, are regulating the market for waste collection and disposal.

The Supreme Court has left no doubt that flow control regulation affects interstate commerce. In *Carbone*, the Supreme Court stated that "[w]hile the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach." 511 U.S. at 389, 114 S.Ct. 1677. Although the Clarkstown ordinance differs from the Counties' laws in that it applied to solid waste originating outside of Clarkstown, the Court also noted that "even as to waste originant in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step." *Id.*; *see On the Green Apartments L.L.C.*, 241 F.3d at 1241 ("While Tacoma's ordinance does not require that the local transportation of out-of-state waste be deposited at a site in the city, it does prevent waste from within the city from being deposited outside of the city."). As such, the Counties' flow control laws sufficiently affect interstate commerce to trigger a deeper dormant Commerce Clause review. As in *Carbone*, "[t]he real question is whether the flow control ordinance[s][are] valid despite [their] undoubted effect on interstate commerce." 511 U.S. at 389, 114 S.Ct. 1677.

1. *Discrimination or Incidental Effects*

Once a court determines that a state regulation affects interstate commerce, it must next determine whether the regulation "discriminates against interstate commerce" or regulates even-handedly with incidental effects on interstate commerce. *Id.* at 390, 114 S.Ct. 1677 (internal quotation marks and citations omitted); *see also Gary D. Peake Excavating v. Town Bd. of Hancock*, 93 F.3d 68, 73 (2d Cir.1996) ("The Supreme Court has established a two-step approach to determine whether a state or municipal law violates the dormant Commerce Clause.").

A local law is discriminatory if it provides for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *USA Recycling v. Town of Babylon*, 66 F.3d 1272, 1281 (2d Cir.1995) (quotation marks omitted); *see also Sal Tinnerello & Sons*, 141 F.3d at 55. Where a plaintiff shows that a regulation is discriminatory, the burden shifts to the state or local government to demonstrate that the local benefits outweigh the discriminatory effects and that no nondiscriminatory alternative exists to effectuate the local goals. *See USA Recycling*, 66 F.3d at 1281-82. A discriminatory state or local regulation is virtually *per se* unconstitutional because of "the virtual certainty that such laws, at least in their discriminatory aspect, serve no legitimate, non-protectionist purpose." *Carbone*, 511 U.S. at 422, 114 S.Ct. 1677 (Souter, *J.*, dissenting); *see Gary D. Peake Excavating*, 93 F.3d at 74. In the rare case where a court finds the local interest compelling and the alternatives non-existent, it must uphold the challenged regulation. *See, e.g., Taylor*, 477 U.S. at 151, 106 S.Ct. 2440 ("Maine's ban on the importation of live baitfish serves legitimate purposes that could not adequately be served by available nondiscriminatory alternatives.").

On the other hand, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844; *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). Because this burden is far less demanding than the burden under *Maine v. Taylor*, the critical inquiry is often "whether [the local law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate

local concerns." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978).

The district court held that the Counties' flow control laws discriminated against interstate commerce in favor of the Authority's designated facilities and that, in light of *Carbone*, the Counties could not, as a matter of law, demonstrate that no alternatives existed. The district court relied on its belief that "[c]ourts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause." (citing *Sal Tinnerello & Sons*, 141 F.3d at 56; *Inc. Vill. of Rockville Ctr.*, 196 F.3d at 397). Accordingly, the district court did not reach the second line of inquiry, *i.e.* whether "the burden imposed [by the regulations] on [interstate] commerce [was] clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844. We review the district court's determination on summary judgment *de novo*, applying the same legal standard as that used by the district court. *See Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 91 (2d Cir.2001). We disagree with the district court on several grounds.

First, the district court erroneously attributed to the Supreme Court a *per se* prohibition against flow control laws. *See Harvey & Harvey*, 68 F.3d at 798 ("That [an] ordinance requires the use of [a] selected facility, thus prohibiting the use of non-designated facilities (which may be out of state), does not itself establish a Commerce Clause violation."); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir.1999) ("We do not interpret *Clarkstown* as explicating a broad-based ban on every flow-control ordinance that happens to be coupled with an exclusive contractual arrangement in favor of an in-state operator."). Unfortunately, the district court's misconception led it to deny the Counties discovery and essentially grant summary judgment without reference to the

unique facts of this case.[3] The Counties' flow control laws, like any other challenged ordinance, must be analyzed under the principles articulated in *Carbone* according to their unique facts. Second, and more importantly, the district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility.

The following discussion focuses on the latter of these errors and concludes that a municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities. As such, the district court should have analyzed the Counties' flow control laws under the *Pike* test to determine whether the laws' effects on interstate commerce substantially outweigh the local benefits.

2. *Private Ownership vs. Public Ownership*

The Counties' waste management scheme creates a bottleneck. Within the bottle, private waste haulers compete for the opportunity to collect solid waste from individual and corporate generators located within the Counties. Once

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[3] In doing so, the district court also effectively foreclosed the Counties' ability to show that they had no reasonable alternatives to implementing flow control laws. Although *Maine v. Taylor* is the only example of a state meeting the strict burden imposed on a discriminatory regulation, district courts should allow localities an opportunity to make that showing. *See, e.g., Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F.Supp. 935, 944 (M.D.Pa.1994) (denying plaintiffs' motion for summary judgment because the defendants' claim that there were no alternatives "raises a disputed issue of material fact"). Such an opportunity may require discovery into, and an examination of, the specific alternatives, if any, available to the locality, based on its unique geographical, practical and historical characteristics.

collected, the private waste haulers must deliver the waste to one of five designated, Authority-owned processing facilities located within the Counties, the "bottleneck." For the time being, once the waste has been delivered, private waste disposal companies, both in-state and out-of-state, stand outside the bottle to bid, on an open and competitive basis, for the right to process and ultimately dispose of the waste delivered to the Counties' transfer station. The parties do not dispute, in any relevant respect, how the Counties' system is organized, but instead disagree about whether the flow control restrictions on private haulers, those within the bottle, are discriminatory under the Commerce Clause.

The Counties and the Authority urge us to analyze the flow control ordinances as part of their overall waste management scheme. Specifically, they argue that the bidding process for the operation of the Utica Transfer Station negates any alleged hoarding of the disposal service because it opens the local disposal market to out-of-state bidders. *See, e.g.*, *Harvey & Harvey*, 68 F.3d at 801-02 (holding that selecting a favored facility or business with an open and fair bidding process that permits out-of-state competition comports with the dormant Commerce Clause). The district court, however, did not reach this aspect of the Counties' system. Furthermore, in several post-*Carbone* decisions, we severed our analysis of flow control ordinances from other aspects of a municipal waste management plan. *See, e.g.*, *Inc. Vill. of Rockville Ctr.*, 196 F.3d at 398-99; *SSC Corp.*, 66 F.3d at 512-13; *see also Huish Detergents v. Warren County*, 214 F.3d 707, 715 (6th Cir.2000). We do so here as well.

a. *Carbone*

Our analysis naturally begins with *Carbone*, the Supreme Court's only occasion thus far to apply the Commerce Clause

to a flow control ordinance. The Supreme Court was presented with the following setting.

The Town of Clarkstown, New York agreed with environmental authorities to close its landfill and build a solid waste transfer station. *See Carbone*, 511 U.S. at 387, 114 S.Ct. 1677. "A local private contractor agreed to construct the facility," which the local contractor would own and operate for a period of five years. *Id.* The town thereafter agreed to buy the station back for one dollar. *Id.* To make the endeavor worthwhile, the contractor charged a set tipping fee for each ton of solid waste disposed of at the transfer station. The town guaranteed the transfer station a minimum yearly waste flow, which was intended to generate tipping fees sufficient to finance the cost of the facility. *See id.* at 412, 114 S.Ct. 1677. To meet the minimum tonnage guarantee, the town enacted a flow control ordinance that required all waste within the town to be delivered to the transfer station. *Id.* The purpose of the ordinance was to "finance [the] new facility with the income generated by the tipping fees." *Id.*

Clarkstown's ordinance differs from the Counties' ordinances in two significant respects. First, the Clarkstown ordinance applied to all solid waste within the town, whether that waste was generated within or outside the town. In contrast, the Counties' flow control ordinances apply only to waste generated within the Counties.[4] We do not rely on that

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[4] Carbone owned a recycling facility within the Town of Clarkstown, but a significant amount of its waste was collected in the state of New Jersey. The briefs and oral argument transcript reveal that Carbone challenged the ordinance only to the extent that its application to waste originating out-of-state increased the cost of disposal for New Jersey generators and subjected Carbone to inconsistent local regulations. *See C & A Carbone v. Town of Clarkstown*, 1993 WL 757637, at *18-19 (U.S. Dec. 7, 1993) (oral

distinction because, in *SSC Corp.*, we struck down a flow control ordinance as "indistinguishable" from the ordinance in *Carbone*, even though the challenged law, unlike *Carbone*, applied only to waste originating within the town. 66 F.3d at 514. Second, the Clarkstown ordinance differs from the Counties' ordinances because the transfer station in Clarkstown was owned by a "local private contractor." *Carbone*, 511 U.S. at 387, 114 S.Ct. 1677. The Counties' transfer station, as well as the other designated facilities, are publicly owned. This latter distinction is determinative.

The majority opinion in *Carbone* held that Clarkstown's flow control ordinance was "just one more instance of local processing requirements that [the Court] long [has] held invalid." *Id.* at 391, 114 S.Ct. 1677. Stated otherwise, the ordinance "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility,"in that case "a single local proprietor." *Id.* at 392, 114 S.Ct. 1677. The Court repeatedly referenced the private nature of the favored facility and repeatedly alluded to the dangers of allowing local government to favor local industry or a single local business over out-of-state competition. For example, the Court held that "the town may not employ discriminatory regulation to give [the designated facility] an advantage over *rival businesses* from out of State." *Id.* at 394, 114 S.Ct. 1677 (emphasis added). And again, "[s]tate and local governments may not use their regulatory power to favor *local enterprise* by prohibiting patronage of out-of-state competitors or their facilities." *Id.* (emphasis added).

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argument transcript); *C & A Carbone v. Town of Clarkstown*, 1993 WL 433038, at *23 (U.S. July 16, 1993) (petitioners' brief); *see also Carbone*, 511 U.S. at 407, 114 S.Ct. 1677 (O'Connor, *J.*, concurring) (striking the ordinance under the *Pike* test, in part because "operations like petitioners' cannot comply with the requirements of both [Clarkstown and the State of New Jersey]").

United Haulers casts a blind eye to the Court's repeated reference to Clarkstown's favoritism for a single local proprietor. United Haulers contends that, read in conjunction, all three *Carbone* opinions imply a rejection of the distinction between public and private ownership for Commerce Clause purposes. The argument proceeds as follows: The dissenters in *Carbone* argued that the favored facility was an agent of the municipality and therefore publicly owned. Accordingly, the dissent argued that the ordinance did not discriminate against out-of-state business in favor of in-state business:

> While our previous local processing cases have barred discrimination in markets served by private companies, Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to revert entirely to municipal ownership. . . .
>
> The majority ignores this distinction between public and private enterprise, equating Local Law 9's "hoard[ing]" of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms.

See id. at 419-20, 114 S.Ct. 1677 (Souter, *J.*, dissenting) (footnote omitted). The majority, the argument continues, although clearly aware of the dissent's contention, nonetheless held that the town may not use discriminatory regulation to earn revenues for its project. This holding, according to United Haulers, necessarily rejected the distinction between public and private ownership relied on by the dissent.

We disagree with United Haulers' reading of *Carbone*. A careful reading of the separate opinions in *Carbone* does not support United Haulers' theory. Indeed, if we were to divine direct guidance from those opinions, we would reach the opposite conclusion; namely, that in *Carbone* the Justices were

divided over the *fact of whether* the favored facility was public or private, rather than on the import of that distinction.

As noted above, the *Carbone* majority referenced the private character of the favored facility several times, *id.* at 387, 114 S.Ct. 1677 ("local private contractor"); *id.* at 392, 114 S.Ct. 1677 ("single local proprietor"); *id.* at 394, 114 S.Ct. 1677 ("to give that project an advantage over *rival businesses* from out of State" (emphasis added)). In contrast, Justice O'Connor, in her concurrence, characterized the Clarkstown scheme as a *public* monopoly, foreclosing competition from all competitors in-state and out-of-state. *See id.* at 402-03, 114 S.Ct. 1677. As such, Justice O'Connor rejected the notion that the Clarkstown ordinance should be found discriminatory and, thus, analyzed under the *Maine v. Taylor* framework. Instead, Justice O'Connor would have analyzed, and ultimately struck down, the ordinance under the *Pike* balancing test. *Id.* at 403-07, 114 S.Ct. 1677. Like Justice O'Connor, the three-justice dissent clearly articulated its view that the Clarkstown transfer station was public for dormant Commerce Clause purposes and, therefore, would have analyzed the ordinance under the *Pike* test. *See id.* at 410-30, 114 S.Ct. 1677. Unlike Justice O'Connor, however, the dissent would have upheld the ordinance. In the face of these opinions, the majority's frequent reference to the private local contractor that legally owned the transfer station and its silence regarding the distinction between public and private ownership leads us to conclude that underlying its analysis of the constitutionality of the ordinance was a finding that the favored facility was private rather than public.

Nevertheless, we require more than the Court's silence on this point before concluding that it either rejected or accepted the public/private distinction advocated by the concurring and dissenting opinions. *See Fort Gratiot Sanitary Landfill v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 358-59, 112 S.Ct. 2019,

119 L.Ed.2d 139 (1992) (noting that the case did not "raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities"). As the majority in *Carbone* did not directly address the issue and its language can fairly be described as elusive on that point, we proceed to examine those "local processing" cases, upon which the Court placed heavy reliance. This examination removes any remaining doubt we may have had regarding the importance of the distinction between private and public ownership in the dormant Commerce Clause analysis of such cases. As discussed in great detail by the *Carbone* dissent, in each and every one of the local processing cases the challenged laws favored a local private business, industry or investment (not a state-owned facility or a public monopoly) to the detriment of out-of-state competitors.

b. *The Local Processing Cases*

A commonly cited example of the Court's local processing cases is *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951). There, the Court struck down a city of Madison, Wisconsin ordinance that required all milk sold in the city to be pasteurized within five miles of the central portion of the city. The ordinance applied to all businesses, in-state and out-of-state. The "practical effect" of the ordinance, however, was to "erect[ ] an economic barrier protecting a *major local industry* against competition from without the State." 340 U.S. at 354, 71 S.Ct. 295 (emphasis added). The fact that out-of-state businesses could build pasteurizing facilities within the five-mile radius did not make it any less discriminatory. Requiring local investment benefitted the city at the expense of other states and municipalities. In *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984), a four-justice plurality confirmed that export restraints undertaken to

"promot[e] employment" or investment within the state fell "within the rule of virtual *per se* invalidity." *Id.* at 100-01, 104 S.Ct. 2237. There, the Court struck down a state regulation requiring in-state processing of timber. *See id.*; *see also Hughes v. Oklahoma*, 441 U.S. 322, 338, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (striking statute that restricted the number of minnows that could be transported out-of-state); *Minnesota v. Barber*, 136 U.S. 313, 323, 10 S.Ct. 862, 34 L.Ed. 455 (1890).

Other decisions in the local processing line of cases evidence the same intent to prevent state or local governments from favoring in-state business or investment at the expense of out-of-state businesses. In *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935), another milk case, the Court struck down an ordinance which erected barriers to out-of-state competition of the local milk industry by instituting a "system of minimum prices." *Id.* at 519, 55 S.Ct. 497. In *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928), the Court struck down a Louisiana statute which forbade the export of shrimp unless the heads and hulls had first been removed within the state. *Id.* at 12-14, 49 S.Ct. 1; *see Johnson v. Haydel*, 278 U.S. 16, 49 S.Ct. 6, 73 L.Ed. 155 (1928) (striking a similar Louisiana statute regarding the pre-shipment processing of oysters); *see also Toomer v. Witsell*, 334 U.S. 385, 403-07, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948) (striking down South Carolina statute that required shrimp fishermen to unload, pack and stamp their catch before shipping it to another state). The Court held these statutes discriminatory because, whether in design or effect, they benefitted the local seafood processing industry over out-of-state competition.

United Haulers asks us to focus on the Court's broadly stated prohibition against the "hoarding" of local resources that otherwise would enter the stream of interstate commerce. A

blanket prohibition against the hoarding of articles of commerce would appear to preclude the Counties' flow control scheme. However, we must interpret the Court's holdings in context, not in a vacuum. The common thread in the Court's dormant Commerce Clause jurisprudence, highlighted in the local processing cases discussed above, is that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition. *See, e.g., College Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (describing the "evil" addressed by the Commerce Clause as "the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens"). The majority in *Carbone* recognized this additional requirement while describing the evils of local processing laws: "Put another way, the offending local laws hoard a local resource—be it meat, shrimp, . . . milk [or garbage]—*for the benefit of local businesses that treat it.*" 511 U.S. at 392, 114 S.Ct. 1677 (emphasis added).

There is sound reason for the Court's consistent, although often unstated, recognition of the distinction between public and private ownership of favored facilities:

> Reasons other than economic protectionism are . . . more likely to explain the design and effect of an ordinance that favors a public facility. . . . An ordinance that favors a municipal facility, in any event, is one that favors the public sector, and if we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position, then surely this Court's dormant Commerce Clause jurisprudence must itself see that favoring

> state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.

Id. at 421, 114 S.Ct. 1677 (Souter, *J.*, dissenting) (internal quotation marks and citation omitted). Not only are such regulations "less likely to be protectionist," *id.*, they are less likely to give rise to retaliation and jealousy from neighboring states. Moreover, ordinances that favor a public facility to the detriment of all private actors are equipped with a built-in check: municipal legislators are accountable to citizens, many of whose interests are likely to be aligned to some degree with the interests of private business, either as owners, employees or investors. Where the local legislation benefits local industry to the detriment of its competition, as in all of the local processing cases, this check is inadequate. Here it is not.

The principal burden of any economic inefficiency imposed by the Counties' ordinances falls on the residents of the Counties. They must pay over twice as much to dispose of their solid waste as they paid prior to the adoption of the ordinances. There is no evidence that any out-of-state business or individual is paying more for waste collection or disposal as a result of the ordinances (as was the case in *Carbone*). The plaintiffs here are local waste collection companies. While it is true that private waste processors both in-state and out-of-state are prevented by the ordinances from competing to perform and receive payment for the operations performed at the mandatory transfer station, that disadvantage does not fall more heavily on out-of-state concerns than on local ones. The out-of-state processors furthermore have not complained, and there is no indication the deprivation represents a meaningful economic loss.

> The Commerce Clause was not passed to save the citizens of Clarkstown from themselves. It should not be wielded

> to prevent them from attacking their local garbage problems with an ordinance that does not discriminate between local and out-of-town participants in the private market for trash disposal services and that is not protectionist in its purpose or effect.

Id. at 430, 114 S.Ct. 1677 (Souter, *J.*, dissenting). To the extent that a state or local government risks causing inconsistent local laws or inciting retaliation among the states to the detriment of the "national market," the *Pike* test is a suitable vehicle for meaningful judicial review. 397 U.S. at 142, 90 S.Ct. 844; *see Healy v. Beer Inst.*, 491 U.S. 324, 336-37, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) (holding that, under the *Pike* test, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States").

United Haulers also relies on the fact that no case has yet expressly relied on the distinction between public and private ownership, *see U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067-68 (8th Cir.2000); *Huish Detergents*, 214 F.3d at 715-16 (striking down regulation that awarded private local waste collection company franchise over County collection duties); *Waste Mgmt. v. Metro. Gov't*, 130 F.3d 731, 733-36 (6th Cir.1997); *Harvey & Harvey*, 68 F.3d at 807-09 (remanding for consideration of effects of local action awarding exclusive waste disposal contract to private local business), and that a number of appellate and district courts have implicitly rejected the distinction without discussion. *See Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1385-89 (8th Cir.1993) (striking down ordinance that required all waste generated within locality to be delivered to public waste facility); *Coastal Carting Ltd. v. Broward County*, 75 F.Supp.2d 1350, 1352 & n.1 (S.D.Fla.1999); *Randy's Sanitation v. Wright County*, 65 F.Supp.2d 1017

(D.Minn.1999); *Zenith/Kremer Waste Sys. v. W. Lake Superior Sanitary Dist.*, 1996 WL 612465, at *1-*3, *10 n. 13 (D.Minn. July 2, 1996); *Waste Recycling v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F.Supp. 1566, 1570, 1577-83 (M.D.Ala.1993) (striking down flow control ordinances which required all waste to be delivered to a Public Authority landfill), *aff'd*, 29 F.3d 641 (11th Cir.1994) (unpublished table decision). Assuming that these courts were faced with pure public ownership of the favored facility, as we are here, their holdings are not binding on our determination and have little persuasive value given that the courts did not directly address the issue we decide today.

Only one case has expressly addressed and rejected the distinction. *See Southcentral Pa. Waste Haulers Ass'n*, 877 F.Supp. at 943. There, private waste haulers were required by law to deliver all solid waste to a landfill, owned and operated by the local solid waste authority, a public corporation. *Id.* at 938. The defendants, like the Counties and the Authority here, argued that *Carbone* did not apply to an ordinance that favored a publicly owned facility. *Id.* at 943. The district court, relying primarily on the Supreme Court's statements about hoarding local resources, was "not persuaded that the public nature of the Authority facility changes the applicable analysis." *Id.* (citing *Waste Sys. Corp.*, 985 F.2d at 1387, and *Waste Recycling*, 814 F.Supp. at 1578). We believe that it does change the analysis and we respectfully disagree with that decision for the reasons already discussed.

Moreover, we find ample precedential support for our conclusion in (1) the consistent underlying facts of the local processing line of cases, a line in which the majority squarely placed *Carbone*, and (2) the opinions of four Supreme Court Justices, all of whom characterized the facility in *Carbone* as publicly owned, and therefore would have analyzed the challenged ordinance under the more lenient *Pike* test. In this

case, unlike *Carbone*, there is no confusion or room for debate regarding the ownership of the favored facilities. They are owned by the Authority, a public entity, and not by any local business.

To summarize, a flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interests over out-of-state interests. Flow control regulations like the Oneida-Herkimer ordinances, which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause. The district court erred by so holding.

C. *The* Pike *Balancing Test*

Having concluded that the Counties' system does not discriminate against interstate commerce in favor of in-state business interests, we admit a temptation to undertake the *Pike* balancing test in the first instance.

This temptation, to which we do not succumb, arises from the well-settled principle that waste disposal is a traditional local government function. *See* Resource Conservation and Recovery Act, 42 U.S.C. § 6901(a)(4); N.Y. Gen. Mun. L. § 120-aa; *Carbone*, 511 U.S. at 419-20, 114 S.Ct. 1677 (Souter, *J.*, dissenting); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982) ("[P]rotecting the health of its citizens—and not simply the health of its economy—is at the core of its police power."); *see also Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 320-21, 26 S.Ct. 100, 50 L.Ed. 204 (1905); *Gary D. Peake Excavating*, 93 F.3d at 76 ("Legislation pertaining to public health and safety consistently has been recognized as an important local interest.").

In the past, we have held that a municipality "has legitimate—indeed, compelling—interests that are served by its waste management program." *USA Recycling*, 66 F.3d at 1288. In *USA Recycling* we went so far as to state that "[t]he local interests that are served by consolidating garbage service in the hands of the town-safety, sanitation, reliable garbage service, cheaper service to residents-would in any event outweigh any arguable burdens placed on interstate commerce." *Id.* at 1295; *see Carbone*, 511 U.S. at 430, 114 S.Ct. 1677 (Souter, *J.*, dissenting) (arguing that any burdens on interstate commerce were "readily justified by the ordinance's legitimate benefits in reliable and sanitary trash processing"). *But see Carbone*, 511 U.S. at 407-10, 114 S.Ct. 1677 (O'Connor, *J.*, concurring). We will follow our own advice, however, and resist the temptation to rule as a matter of law prior to adequate discovery and further argument by the parties, which will undoubtedly assist the district court in this fact-intensive determination.

We do hold, however, that although it does not, in and of itself, give a municipality free reign to place burdens on the free flow of commerce between the states, the fact that a municipality is acting within its traditional purview must factor into the district court's determination of whether the local interests are substantially outweighed by the burdens on interstate commerce. With that understanding, we reverse and remand for a determination of whether the Counties' flow control laws pass constitutional muster under the *Pike* balancing test.

CONCLUSION

For the foregoing reasons, we reverse the district court's judgment and remand for further proceedings consistent with this opinion.

The parties shall bear their own costs.

CALABRESI, J., concurring:

I concur in both the result and the opinion. I do so because this case deals with waste processing by a publicly owned facility. Waste disposal is both typically and traditionally a local government function. With respect to such functions, the opinion's analysis of the significance of public ownership under *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), seems to me quite right. Whether the same analysis would apply to activities that are not traditionally governmental is not before us. This case therefore does not answer the question of how such situations are to be examined in light of *Carbone*.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED HAULERS ASSOC., INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC. and INGERSOLL PICKUP, INC.,

Plaintiffs,

-v.-

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA and COUNTY OF HERKIMER,

Defendants.

Civil Action No. 95-CV-516

APPEARANCES: OF COUNSEL:

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ROSEMARY S. POOLER, C.J.*

MEMORANDUM-DECISION AND ORDER

Plaintiffs United Haulers Association, et. al (collectively, the "Haulers") brought this lawsuit against defendants Oneida-Herkimer Solid Waste Management Authority (the "Authority") and Oneida and Herkimer counties to challenge the laws defendants enacted to manage disposal of local solid waste, known as flow control. Plaintiffs claim that the flow control laws violate the U.S. Constitution's commerce clause because they restrict interstate trade in solid waste and waste disposal services. Defendants argue that their comprehensive waste management system, of which flow control is one part, is a necessary public service.

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* Rosemary S. Pooler, United States Court of Appeals Judge for the Second Circuit, sitting by designation as a United States District Court Judge for the Northern District of New York.

BACKGROUND

During the 1980s, Oneida and Herkimer counties commissioned several professional studies and conducted a series of public and legislative hearings and debates in order to fashion a solid waste management plan. Their efforts culminated in a request to the New York state legislature to pass the Oneida-Herkimer Solid Waste Management Authority Act, which was effective on September 1, 1998. The Act created the public benefit corporation Oneida-Herkimer Solid Waste Management Authority. N.Y. Pub. Auth. L. §§ 2049-aa, et. seq. (McKinney 2000).

According to defendants, the Authority "is a public body which has functioned at all material times as an instrument of the Counties in the administration of local solid waste management policy." Def.'s Statement of Material Facts, Dkt. No. 21, ¶ 8. Specifically, the Authority has the power to collect, transport, process and dispose of solid waste; to plan, develop and construct waste management projects; to contract with Oneida and Herkimer regarding waste management; to issues regulations and set and collect fees related to waste management projects; and to borrow money and issue bonds. See N.Y. Pub. Auth. L. § 2049-ee. The Authority also has the power to enter contracts with the counties concerning, among other things, flow control, and the counties have the power to pass flow control ordinances. Id. § 2049-tt.

In May 1989 and December 1989, Oneida, Herkimer and the Authority entered contracts concerning solid waste management. Aff. of Kristin Carter Rowe, Esq., Dkt. No. 15, Exs. F & G. The contracts required the Authority to purchase or lease existing county facilities, which included an incinerator in Rome, a recycling center in Utica, and a recycling center in Ilion; to operate the existing facilities; to develop future facilities; and to issue rules and regulations concerning

facilities' operations. Oneida and Herkimer agreed to deliver "all solid waste originated or brought within their respective jurisdictions to the transfer station or stations or other facility designated by the Authority." Id. Ex. F, § 205. The May 1989 contract permitted the Authority to charge tipping and user fees to fund the purchase, construction and operation of waste management facilities. Under the December 1989 contract, the Authority agreed to issue and sell bonds to fund the study and implementation of a solid waste management plan for Oneida and Herkimer, and the counties agreed to pay any shortfall between the Authority's operating expenses and revenues. Id. Ex. G, §§ 3.03, 5.01, 5.02.

In December 1989, Oneida passed its flow control ordinance, and Herkimer followed suit in February 1990. Rowe Aff., Dkt. No. 15, Exs. B & C. In relevant part, the Oneida ordinance states that "solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the [County]." Id. Ex. B § 2(d). The Oneida law requires all haulers to obtain a permit from the Authority, and the law states that construction debris, green waste, commercial and industrial waste, and hazardous waste shall be delivered to designated facilities. Penalties for noncompliance include permit revocation, fines up to $5,000, and up to 30 days in jail. Id. Ex. B, § 12(b). The Herkimer ordinance is nearly identical to the Oneida law, although the Herkimer law caps fines at $2,000. Id. Ex. C, §§ 2(c), 13(a).

The Authority itself issued rules and regulations for its facilities, which include an ash landfill, an incinerator, a green waste compost facility, a household hazardous waste collection site, a recycling center and a transfer station. Aff. of Hans G. Arnold, Dkt. No. 25, Ex. A-7. Most importantly, the regulations state that "[h]aulers must deliver all acceptable solid waste and curbside collected recyclables generated within

Oneida and Herkimer Counties to an Authority designated facility." Id. § 8. The regulations also require all haulers to obtain and comply with permits that the Authority issues or face penalties including permit revocation, fines up to $5,000, and up to 30 days imprisonment. Id. at §§ 1, 8-9. The permits incorporate Authority regulations.

With the various contracts, local ordinances, and regulations in place, the Authority issued $42.8 million in revenue bonds in March 1990 to fund the purchase and construction of waste management facilities. Rowe Aff., Dkt. No. 15, Ex. H. The Authority issued $8.1 million in revenue bonds in November 1991 to, among other things, finance a transfer station in Utica. Id. In 1992, the Authority redeemed its outstanding bonds with proceeds from a new bond issue of $50.5 million. Id. The Authority has enforced flow control in the counties and in 1995 charged a tipping fee for solid waste of $86 per ton. Id. ¶ 23. According to plaintiffs, they could dispose of the same solid waste at various New York and out-of-state landfills at tipping fees ranging from $40 to $70 per ton.[1] See, e.g., Aff. of David N. Levitt, Dkt. No. 16, at ¶ 10; Aff. of Jeff Bliss, Dkt. No. 17, at ¶ 11. Plaintiffs estimate that the economic impact of the solid waste trade in Oneida and Herkimer counties in 1995 was approximately $30.9 million,

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[1] Defendants state that the Haulers operate pursuant to contracts they signed with individual municipalities or residents. According to defendants, these contracts "establish that plaintiffs do not absorb any of the tipping fees or other disposal costs charged by the Authority," which the Haulers pass through to their customers, and "that plaintiffs are not in fact authorized by their customers to dispose of non-recyclable waste at facilities other than those operated by the Authority." Def.'s Statement of Material Facts, Dkt. No. 21, ¶ 19. These contracts are not in the record, and their relevance, if any, is limited to damages.

which is the product of 359,890 tons of waste and the $86 per ton tipping fee. See Rowe Aff., Dkt. No. 15, at ¶ 32.

Plaintiffs filed their complaint in federal court on April 14, 1995. Compl., Dkt. No. 1. In their first cause of action, the Haulers claim that defendants' flow control laws violate the Constitution's commerce clause because the laws discriminate against interstate commerce. Compl. ¶¶ 73-86. Plaintiffs seek declaratory relief and a permanent injunction preventing defendants from enforcing flow control laws. In their second cause of action, the Haulers claim damages under Section 1983, 42 U.S.C. § 1983, because defendants violated their constitutional rights. Compl. ¶¶ 87-95. The Haulers state that they suffered damages as a result of "excessive tipping and disposal fees and the costs and attorneys' fees incurred in this action." Compl. ¶ 95. Defendants filed their answers to the complaint on June 15 and 16 of 1995. Dkt. Nos. 8, 9. The parties have conducted no discovery.[2] By notice of motion, the Haulers sought summary judgment. While decision on the summary judgment motion was pending, I denied plaintiffs' motion for a temporary restraining order. See Dkt. No. 71.

DISCUSSION

I. Summary judgment standard

Summary judgment shall enter if, when viewing the evidence in the light most favorable to the nonmovant, the court determines that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456 (1992). A party seeking summary judgment must demonstrate the absence of a genuine issue of

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[2] The magistrate judge assigned to this matter stayed discovery pending decision on the summary judgment motion. See Dkt. No. 58.

material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant satisfies this initial burden, then the burden shifts to the nonmovant to proffer evidence demonstrating that a trial is required because a disputed issue of fact exists. Weg. v. Macchiarola, 995 F.2d 15, 18 (2d Cir. 1993). The nonmovant must do more than present evidence that is merely colorable, conclusory, or speculative and must present "concrete evidence from which a reasonable juror could return a verdict in his favor . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The nonmovant must do more than show "some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

II. Commerce Clause

The legal analysis required to determine whether defendants' flow control laws violate the commerce clause is well settled in light of several Second Circuit decisions following the Supreme Court's examination of the same issue in C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994). While the commerce clause permits Congress to act affirmatively in regulating interstate commerce, the so-called dormant commerce clause "prohibit[s] the states, in the absence of specific congressional authorization, from regulating interstate commerce." Incorporated Village of Rockville Centre v. Town of Hempstead, 196 F.3d 395, 398 (2d Cir. 1999). A state's "actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow." Carbone, 511 U.S. at 389.

A. Legal Standard

The court first must decide whether the state is regulating the market or participating in it. See Sal Tinnerello & Sons v. Town of Stonington, 141 F.3d 46, 55 (2d Cir.), cert. denied, 525 U.S. 923 (1998). Participating in the market typically

means that the state is "buying or selling goods as any private economic actor might." USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1281 (2d Cir. 1995). No commerce clause violation exists in the case of market participation. See Sal Tinnerello, 141 F.3d at 55. Regulating the market generally means that a state is exercising its governmental powers in methods unavailable to private parties. See SSC Corp. v. Town of Smithtown, 66 F.3d 502, 512 (2d Cir. 1995). Classic hallmarks of government regulation are the threatened imposition of fines and/or jail terms to compel behavior. See id. If the state is regulating interstate commerce, then the court next must decide whether the regulation (1) is even-handed with only incidental effects on interstate commerce; or (2) discriminates against interstate commerce. See USA Recycling, 66 F.3d at 1281 (quotation and citation omitted). See also Sal Tinnerello, 141 F.3d at 55.

An even-handed, or nondiscriminatory regulation has only "incidental effects on interstate commerce" and is valid "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." USA Recycling, 66 F.3d at 1281 (quotations and citations omitted). In contrast, a discriminatory regulation is "virtually per se invalid," and courts strictly scrutinize it. See Gary D. Peake Excavating Inc. v. Town Bd. of the Town of Hancock, 93 F.3d 68, 74 (2d Cir. 1996) (quotation omitted). A discriminatory regulation entails "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." USA Recycling, 66 F.3d at 1281 (quotation and citation omitted). In other words, the invalid regulation "discriminates against commerce by treating in-state interests preferentially." Sal Tinnerello, 141 F.3d at 55.

In order to prevail, plaintiffs must show either that (1) the flow control laws are discriminatory; or (2) the flow control laws place a burden on interstate commerce clearly excessive

in relation to the claimed local benefits. See USA Recycling, 66 F.3d at 1281-82. If plaintiffs prove that a regulation is discriminatory, "the burden shifts to the state or local government to show that the local benefits of the statute outweigh its discriminatory effects, and that the state or municipality lacked a nondiscriminatory alternative that could have adequately protected the relevant local interests." Id.

B. Application of standard

The local laws that Oneida and Herkimer counties enacted require all commercial haulers to deliver solid waste they collect within the counties to facilities that the counties or the Authority designate, which are the facilities that the Authority owns and operates. These flow control laws are virtually indistinguishable from the laws examined and struck down in both Carbone and SSC Corp. See Carbone, 511 U.S. at 386; see also SSC Corp., 66 F.3d at 505. As the Second Circuit recently summarized those holdings, "[t]he ordinances in Carbone and SSC Corp. were found to be discriminatory because they required all waste within the town to be disposed of at the one favored local facility, to the exclusion of out-of-state competitors." Gary D. Peake, 93 F.3d at 75. Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause. See Sal Tinnerello, 141 F.3d at 56 (summarizing SSC Corp. holding striking down flow control law); Rockville Centre, 196 F.3d at 397 (noting that defendant town conceded and district court agreed that flow control ordinance was unconstitutional under Carbone); Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 75 (2d Cir. 1998) (summarizing Carbone holding striking down flow control laws); USA Recycling, 66 F.3d at 1278 (noting that defendant town stopped enforcing its flow control ordinance in light of Carbone). All of these cases determined that flow control ordinances were discriminatory. I accordingly conclude that the flow control laws in Oneida and

Herkimer counties also violate the dormant commerce clause. The laws are discriminatory and per se invalid. As explained more fully below, defendants offered no evidence to meet their burden justifying the ordinances, and the Supreme Court has rejected as a matter of law the arguments they raise on this point. Summary judgment in favor of plaintiffs therefore is appropriate.

In their opposition papers, defendants argue preliminarily that plaintiffs lack standing to challenge the flow control laws because they are in the business of collecting and hauling waste rather than disposing of it. Defendants claim that plaintiffs have no legitimate expectation to take the waste to out-of-state facilities. This argument ignores the fact that the Haulers suffer injury when they pay higher tipping fees at the Authority facilities than they would at other plants. Moreover, many of the relevant cases featured haulers as plaintiffs challenging various aspects of flow control, and all of these haulers had standing in federal court. See Automated Salvage Transp., 155 F.3d at 66; Sal Tinnerello, 141 F.3d at 51; SSC Corp., 66 F.3d at 507; USA Recycling, 66 F.3d at 1279-80. Finally, as discussed in part III of this opinion, while the United Haulers Association, Inc. does not have standing to pursue a claim under 42 U.S.C. § 1983, it does have standing under the Declaratory Judgment Act cause of action. See American Charities for Reasonable Fundraising Regulation, Inc. v. Shiffrin, 46 F. Supp. 2d 143, 153 (D. Conn. 1999) (granting defendants' motion to dismiss plaintiff organization from Section 1983 cause of action but leaving intact organization's request for declaratory relief), aff'd, 2000 WL 232656 (2d Cir. Feb. 25, 2000).

Defendants argue that summary judgment is inappropriate because they are entitled to discovery regarding the discriminatory effects of flow control on interstate commerce and the lack of a nondiscriminatory alternative to flow control,

which concern their burden under the strict scrutiny test outlined above. Defendants also contend that they are entitled to discovery concerning the history of the counties' solid waste management efforts, purpose of flow control, and materials disposed of within the counties. To the extent that any factual issues exist, they are not material to my decision regarding the constitutionality of the flow control laws. The laws and regulations speak for themselves and are not disputed. The discriminatory effects of flow control also are a settled matter of law after the Supreme Court's decision in Carbone, and defendants offer no new arguments on this point. See Carbone, 511 U.S. at 391-92. The Supreme Court also rejected as a matter of law defendants' arguments that no less restrictive alternative to flow control exists or that the public benefits of the laws outweigh a burden on interstate commerce. See id. at 392-93. The remaining issues defendants raise are wholly irrelevant to my analysis. Defendants' plea for discovery therefore is unavailing.

Defendants also contend that their legislation is not like the unconstitutional flow control laws because it is an inextricable part of a public waste management system for the local management of local waste. As noted above, however, the relevant case law consistently has extracted flow control laws as an improper element of general waste management schemes. See, e.g., Rockville Centre, 196 F.3d at 397. Defendants argue that their waste management system is like the scheme that the Second Circuit approved in USA Recycling, where the town assumed exclusive responsibility for garbage collection and disposal. See USA Recycling, 66 F.3d at 1283. What defendants ignore, however, is that the defendant town in USA Recycling stopped enforcing its illegal flow control ordinance, which Oneida and Herkimer counties have not done. See id. at 1278. Nor have the counties entirely eliminated the private market for garbage collection services, which the local

government did in USA Recycling. The counties only have taken over disposal and ordered all local private haulers to purchase that service from the counties and the Authority. In other words, the counties impermissibly act "as a business selling to a captive consumer base." Id. at 1283. Defendants argue that they merely have restructured the private collection market and prohibited haulers from crossing over into the disposal market, but the flow control laws dictate where the haulers must bring local solid waste and at what price. Although defendants contend repeatedly that their system treats all parties alike with respect to disposal services, what they actually are doing is hoarding all local solid waste for the benefit of a preferred local disposal facility. See Carbone, 511 U.S. at 392. Consequently, I find based on undisputed facts that the flow control laws are unconstitutional because they discriminate against interstate commerce.

C. Remedy

Because the flow control laws violate the commerce clause, defendants are enjoined from enforcing them. The parties at this stage of the proceedings have not addressed the issue of damages, which may involve complex assessments of lost profit and lost business opportunities that the plaintiffs incurred over a period of years. Defendants contend that the Haulers passed on their increased costs from higher tipping fees to their municipal and residential customers, but there is no evidence in the record to support this claim. See Def.'s Statement of Material Facts, Dkt. No. 21, ¶ 19. I therefore refer this matter to the magistrate judge solely for assessment and calculation of damages. The magistrate judge is free to take evidence in whatever form he or she deems appropriate. I do not express any view regarding whether a limitation on damages is appropriate.

III. Section 1983

The Haulers also brought a cause of action pursuant to 42 U.S.C. § 1983, claiming that defendants deprived them of the right to freely engage in interstate commerce by enacting and enforcing flow control.[3] Defendants' primary argument regarding this claim concerns not its merits but the alleged need for discovery on the issue of plaintiffs' standing.[4]

Plaintiffs can sue local governments directly under Section 1983 "for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." Monell v. Department of Soc. Servs., 436 U.S. 658, 690 (1978). Violations of the commerce clause fall within the scope of Section 1983. Dennis v. Higgins, 498 U.S. 439, 446 (1991). The commerce clause confers a right on plaintiffs "to engage in interstate trade free from restrictive state regulation." Id. at 448. Cf. Valley Disposal, Inc. v. Central Vermont Solid Waste Management Dist., 31 F.3d 89, 102 (2d Cir. 1994) (allowing plaintiffs to pursue Section 1983 claim challenging flow control

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[3] The statute provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory. . .subjects, or causes to be subjected, any citizen of the United States. . .to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

[4] Defendants also argue that the Section 1983 claim is without merit because plaintiffs failed to establish a commerce clause violation. Obviously, I disagree.

laws as violating dormant commerce clause). As noted above, defendants violated the dormant commerce clause as a matter of law when they enacted flow control laws. Defendants do not dispute that the counties and public benefit corporation Authority are state actors. Defendants do not enjoy immunity from suit because they are municipalities whose policies caused a constitutional injury. See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166 (1993).

Defendants contend only that the Haulers, specifically the United Haulers Association, Inc., failed to demonstrate standing because the association has not (1) identified its members or explained its purpose; or (2) explained the nature of its members' injuries or linked the injuries to its purposes. Although I do not adopt defendants' arguments, I agree that the association lacks standing only with respect to the Section 1983 cause of action. The Second Circuit "has restricted organizational standing under § 1983 by interpreting the rights it secures to be personal to those purportedly injured." League of Women Voters of Nassau County v. Nassau County Bd. of Supervisors, 737 F.2d 155, 160 (2d Cir. 1984); see also American Charities, 46 F. Supp. 2d at 152-53.[5] The association therefore may not sue under Section 1983 to secure the interstate commerce rights of its members. As noted in part II of this opinion, the association does have standing to pursue its claim under the Declaratory Judgment Act. The named plaintiffs have standing under Section 1983 because the interstate commerce rights that defendants violated are personal to these parties. Finally, plaintiffs note correctly that damages are not an element of the Section 1983 claim, and while the

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[5] Plaintiffs do not argue that they have standing under the exception that the Second Circuit identified for organizations asserting a violation of the right to associate. See League of Woman Voters, 737 F. 2d at 161.

association itself cannot collect damages, the individual named plaintiffs may. See Warth v. Seldin, 422 U.S. 490, 515-16 (1975). I refer this matter to the magistrate judge to determine what, if any, damages and attorneys' fees are warranted.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment on their first cause of action is granted and defendants are enjoined from enforcing flow control laws as described in this opinion. The United Haulers Association, Inc. lacks standing only with respect to the claim under Section 1983, but I grant the remaining plaintiffs summary judgment on that second cause of action. This matter is referred to the magistrate judge for calculation of damages, which may require the solicitation of additional evidence from the parties.

IT IS SO ORDERED.

Dated: March 31, 2000
Syracuse, New York

/s/ ROSEMARY S. POOLER
Designated District Court Judge

ONEIDA COUNTY BOARD OF LEGISLATORS

RESOLUTION NO. 301

INTRODUCED BY: MESSRS. JULIAN, HARTWELL, CREASER, HERTLINE

2ND BY: MR. KELLY

LOCAL LAW INTRODUCTORY "I" OF 1989
LOCAL LAW NO. 1 OF 1990

RE: LOCAL LAW FOR THE COLLECTION AND DISPOSITION OF SOLID WASTE INCLUDING GARBAGE, RECYCLABLES, CONSTRUCTION AND DEMOLITION DEBRIS, APPLIANCES, FURNISHINGS, GREEN WASTE, HOUSEHOLD HAZARDOUS WASTE, FARM HAZARDOUS WASTE AND INFECTIOUS WASTE, AND FOR THE PROHIBITION OF THE DISPOSAL OF ANY WASTE MATERIALS IN ANY MANNER EXCEPT AS SET FORTH IN THE LAW.

Section 1. Definitions

As used in this local law, the following terms shall have the following meanings:

(a) "Authority" means the Oneida-Herkimer Solid Waste Management Authority.

(b) "Board" means the Oneida County Board of Legislators.

(c) "Commercial" means any person, company, partnership, municipality or other entity providing a public service or engaged in a business for profit.

(d) "Commercial and Industrial Waste" shall include all non-hazardous and non-toxic solid wastes generated by

commercial and industrial sources exclusive of commercial and industrial by-products.

(e) "Construction and Demolition Debris" means solid waste resulting from construction, remodeling, repair and demolition of structures, road building, and land clearing. Such wastes include but are not limited to bricks, concrete and other masonry materials, soil, rock, lumber, road spoils, paving material and tree and brush stumps.

(f) "County" means the County of Oneida.

(g) "Farm Hazardous Waste" shall mean pesticides and/or pesticide residue and all containers containing the same which are or will no longer be utilized for farm purposes.

(h) "Green Waste" shall mean grass clippings, leaves, and cuttings from shrubs, hedges and trees, and garden debris.

(i) "Household Garbage" means putrescible solid waste, including animal and vegetable waste resulting from the handling, storage, sale, preparation, cooking or serving of foods. Household garbage originates primarily in home kitchens, stores, markets, restaurants, and other places where food is stored, prepared or served.

(j) "Household Hazardous Wastes" are exempt from State and Federal regulations; for the purpose of this local law, household hazardous waste shall include pesticides, pesticide residue and all containers containing the same, used motor oil and automobile batteries.

(k) "Household Metals" shall mean any empty metal food containers including aluminum, bimetal and steel cans.

(l) "Infectious Waste" shall be as defined in 6 NYCRR Part 360 as amended.

(m) "Large Household Furnishings" shall mean all other large and/or bulky articles actually used in the home and which equip it for living (as chairs, sofas, tables, beds, carpets, etc.)

(n) "Major Appliances" shall mean a large and/or bulky household mechanism (as a refrigerator, washer, dryer, stove, etc.) ordinarily operated by gas or electric current.

(o) "Municipality(ies)" means any village, town or city in the County.

(p) "Person" shall mean any individual head of household, landlord, chief executive officer, owner or manager of a commercial or industrial establishment.

(q) "Recyclable Commercial and Industrial By-products" shall include all materials which are a by-product of production utilized in production or sale after sale by a commercial enterprise or industrial enterprise.

(r) "Recyclable Material(s)" means any material which, under any applicable law is not hazardous and which may be separated from the waste stream and held for its material recycling or reuse value.

(s) "Recyclables" means any material designated, from time to time, by the County or the Authority pursuant to contract with the County which, under any applicable law or regulation, is not hazardous and which is separated from the waste stream and held for its material recycling or reuse value.

(t) "Recyclers" shall mean those who deal with recyclable material, including but not limited to, collectors, separators and marketers. This definition shall include not-for-profit corporations and charitable corporations which collect recyclables for fund raising purposes.

(u) "Solid Waste" means all putrescible and non-putrescible solid wastes, including, but not limited to, materials

or substances discarded or rejected as being spent, useless, worthless, or in excess to the owners at the time of such discard or rejection, or are being accumulated, stored, or physically, chemically or biologically treated prior to being discarded or rejected, having served their intended use, or as a manufacturing by-product, including, but not limited to, garbage, refuse, industrial, commercial and agricultural waste, sludges from air or water pollution control facilities or water supply treatment facilities, rubbish, ashes, contained gaseous material, incinerator residue, demolition and construction debris and offal, but not including sewage and other highly diluted water-carried materials or substances and those in gaseous form, special nuclear or by-prodcut [sic] material within the meaning of the Atomic Energy Act of 1954, as amended, or waste which appears on the list or satisfies the characteristics of hazardous waste promulgated by the Commissioner of the Department of Environmental Conservation.

(v) "Source Separation" means the segregation of recyclable materials from the solid waste stream at the point of generation for separate collection, sale or other disposition.

(w) "Vehicular Tires" shall mean tires from cars and trucks and their casings.

(x) The terms "solid waste", "recyclable material", "construction and demolition debris" and "major appliances" shall not be construed to include "green waste".

Section 2. Preparation of Solid Waste and Recyclables for Residential Collection.

In order to provide for public health and safety and to facilitate the conservation of vital natural resources, each city, town and/or village within the County shall provide for the collection of solid waste and recyclable material. Each

municipality shall provide to the County a plan for approval to provide for such collection. Such plan must demonstrate that regular, reliable collection of solid waste and recyclable material will be provided to each property which generates that material to that municipality.

No person shall dispose of solid waste or recyclable or nonrecyclable material except as follows:

(a) In order to provide for public health and safety and to facilitate the conservation of vital resources: Each person shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator to a disposal location approved by the County.

(b) In order to facilitate the conservation of vital natural resources through recycling, each person shall provide for the separation of recyclables in a suitable container for recyclable material as authorized or provided by the County or by the Authority pursuant to contract with said County.

(c) In order to further facilitate the conservation of vital natural resources through recycling: Discarded newspapers, glass, metals, corrugated cardboard, plastics, office paper and green waste shall be separated from other nonrecyclable material and placed in said container; the particular requirements for separation shall be established by the County or by the Authority pursuant to contract with the County.

(d) From the time of placement of solid waste and of recyclables at the roadside or other designated area approved by the County, or by the Authority pursuant to contract with the County, by a person for collection in accordance herewith, such solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated

by the County or by the Authority pursuant to contract with the Authority. It shall be a violation of this ordinance for any person without a valid permit issued by the County to commercially collect, pickup, remove or cause to be collected, picked up or removed any solid waste and/or recyclables placed at the roadside or other designated area and each such collection, picking up, or removal from one or more premises shall constitute a separate and distinct offense in violation of this ordinance. A resident may dispose of their recyclables by selling or donating the same to recyclers, but these recyclables may not be picked up at the roadside.

(e) It shall be a violation of this ordinance for any person to place at the roadside for collection any can or container other than one which has its contents separated into solid waste and/or recyclables.

(f) Tipping fees, if necessary for the collection, handling and disposal of recyclables shall be established by the Board as needed from time to time (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 3. Marketing of Recyclables.

(a) In order to facilitate the marketing of recyclables, the County shall request letters of interest from recyclers expressing their willingness to accept recyclables. A list of interested parties will be established by the County.

(b) Prior to the marketing of recyclables, recyclers appearing on the list will be notified and given specifications with regard to available recyclables.

(c) In the event that recyclers submit a written proposal on said recyclables, it shall be required that said proposal be delivered to the County according to the specifications set forth by the County. Overall costs, the reliability that recyclables

will be accepted by the proposer, the contract term and conditions, including recyclables specifications, for the acceptance of recyclables shall all be major factors in evaluating and awarding a contract.

(d) All marketing of recyclables collected and separated shall, where practicable, be subject to competitive bid. It shall be a term and condition of all bids for recyclables collected under this local law that the material purchased will be recycled and not landfilled or burned or otherwise not recycled.

(e) For purposes of this Section 3, all contracts awarded on or prior to the acceptance test of the Oneida-Herkimer Materials Recovery Facility shall be effective pursuant to its terms. The acceptance test referred to in this subsection 3(e) shall be the Plant Acceptance Test conducted pursuant to Section 15600.4 as contained in Specifications for the Oneida-Herkimer Materials Recovery Facility, Contract No. 5, Contractor Bid No. H-104-C-1, Process Mechanical. After the date of the acceptance test, this Section 3 shall no longer be of any force or effect.

Section 4. Preparation of Residential, Commercial and Industrial Construction and Demolition Debris and Disposal of Same.

(a) Each city, town and/or village within the County shall provide a schedule for the collection of residential, commercial and industrial, construction and demolition debris. Such debris which is recycled or reused for construction shall not be regulated by this ordinance.

(b) Said debris shall be delivered to the appropriate facility or entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the County.

(c) Tipping fees or other charges for the handling and disposal of residential, commercial and industrial and construction and demolition debris shall be established and modified by the Board as needed from time to time (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 5. Preparation of Residential Green Waste and Disposal of Same.

(a) Each city, town and/or village within the County shall provide a schedule for the collection of residential green waste.

(b) Said green waste shall be composted either by the County or pursuant to contract with the Authority at a site or sites designated by the County or, as applicable, the Authority, or at sites approved by it operated by cities, towns or villages. Where allowed by law or regulation, this section shall not prohibit private composting of green waste.

(c) Tipping fees or other charges for the handling and disposal of residential green waste shall be established and modified by the Board as needed from time to time either upon [sic] (i) upon its initiative, (ii) upon the recommendation of the County Executive or (iii) pursuant to the contract with the Authority.

Section 6. Disposal of Commercial and Industrial Waste and Recyclables.

(a) All commercial and industrial waste collected by either municipal or private haulers shall be delivered to the appropriate facility or entity or person responsible for disposition designated by the County.

(b) All commercial and industrial recyclables collected by either municipal or private haulers and designated for processing and/or disposal at a County or Authority facility

shall be packaged and collected in a manner designated by the County or the Authority pursuant to contract with the County and delivered to a facility or entity or person responsible for its disposition designated by the County.

(c) Tipping fees or other charges for the handling and disposal of commercial and industrial waste and recyclables shall be established and modified by the Board as needed from time to time upon [sic] (i) upon its initiative, (ii) upon the recommendation of the County Executive or (iii) pursuant to contract with the Authority.

(d) Commercial or industrial recyclables collected by the metal industry, recyclers, and their agents, as well as the recyclable materials that they separate and market shall be exempt from this ordinance. Any waste they tender for municipal collection shall not include recyclables.

(e) Recyclable industrial and commercial by-products may be sold or donated by an industrial and/or commercial enterprise to any scrap metal enterprise or recycler. However, said by-products cannot be placed at the curbside for collection by said scrap metal enterprise or recycler.

Section 7. Disposal of Major Appliances and Tires.

(a) Each city, town and/or village within the County shall provide a schedule for the collection and disposal of major appliances and tires.

(b) Said major appliances and tires shall be disposed either by the County or pursuant to contract with the Authority at a site or sites designated by the County or at sites approved by the County operated by city, towns or villages.

(c) Tipping fees or other charges for the handling and disposal of major appliances and tires shall be established and modified by the Board as needed from time to time upon [sic]

(i) upon its initiative, (ii) upon the recommendation of the County Executive or (iii) pursuant to contract with Authority.

Section 8. Preparation of Residential Hazardous Waste for Collection and Disposal of the Same.

(a) All household hazardous waste and farm hazardous waste shall be placed in a container determined by the County or the Authority pursuant to contract with the County.

(b) Household hazardous waste and farm hazardous waste shall be delivered to such facility or entity or person responsible for disposition as the County or the Authority, pursuant to contract with the County, shall determine.

(c) Tipping fees or other charges for the handling and disposal of household hazardous waste and farm hazardous waste shall be established and modified by the Board as needed from time to time upon [sic] (i) upon its initiative, (ii) upon recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 9. Disposal of Infectious Waste.

(a) Commencing January 1, 1990, all infectious waste as defined and regulated by Title 6 of the official compilation of Codes, Rules and Regulations of the State of New York (NYCRR) Part 360, shall be disposed of at a location designated by the County or by the Authority pursuant to a contract with the County and by a method specified and approved by the County or the Authority, pursuant to contract with the County, and in compliance with all applicable State laws and regulations.

Section 10. Solid Waste Collection and Disposal Permit.

(a) Commencing January 1, 1990, all persons, companies, partnerships, municipalities or other entities engaged in the commercial collection, pick-up, transfer, removal and/or

disposal of solid waste and/or recyclables, in the County placed at the roadside or other designated location and as defined in this law shall obtain a permit issued by the County or by the Authority pursuant to contract with the County. Failure to obtain such permit shall prohibit any such person, company, partnership, municipality or other entity from conducting such activities within the County. Failure to comply with this Subsection 10(a) shall subject the violator to the penalties set forth in Section 12.

(b) Failure to comply with the conditions and requirements of a permit issued pursuant to Section 10(a) hereof shall subject such person, company, partnership, municipalities or entity to a revocation of such permit and revocation of all rights and privileges to collect, pick up, transfer, remove or dispose of solid waste or recyclables in the County as defined herein, and further such failure to comply with this Subsection 10(b) shall subject the violator to the penalties set forth in Section 12.

Section 11. Prohibition Against Unauthorized Dumping.

By the adoption of this law, the Oneida County Board of Legislators also declares its intent to regulate the throwing, dumping, depositing and placing of solid waste and recyclable material on lands within Oneida County. This ordinance shall apply to throwing, dumping, depositing and placing of solid waste and recyclable material upon all lands, public or private, within Oneida County and thereon only in the manner herein provided:

(a) In order to provide for public health and safety and to facilitate the conservation of vital natural resources: each person shall provide the removal of garbage and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator to a disposal

location approved by the County or the Authority pursuant to contract with the County.

1) It shall be a violation of this law for any person to place for the purpose of collection solid waste and/or recyclables at a property other than the property generating said material.

2) It shall be a violation of this law for any person to place solid waste and/or recyclable material in dumpsters and/or containers designated for solid waste use by commercial and/or industrial establishments.

3) It shall be a violation of this law for any person to bury and/or burn solid waste material on public or private property.

4) It shall be a violation of this law for any person to throw, dump, deposit or place solid waste and/or recyclable material along the roadside or on public and/or private property within Oneida County.

5) It shall be a violation of this law for any person to cause to be thrown, dumped, deposited, or placed solid waste and/or recyclable material along any public or private road or on lands bordering such roads.

Section 12. Enforcement: Penalties.

(a) Failure to comply with this ordinance by any person or tenant in cases where a lease agreement gives specific responsibility for solid waste disposal to said tenant, shall be an offense punishable as provided.

(b) Conviction of a first offense provided by this article shall be punishable by a fine of not less than $100 and not more than $500 and/or loss of solid waste collection and disposal permit, and in addition, anyone convicted of a first offense thereunder shall be liable to pay a civil penalty of not less than

$100 and not more than $500. Conviction of a second offense within a year of the first offense shall be punishable by a fine of not less than $500 nor more than $1,000 and/or loss of solid waste collection and disposal permit, or imprisonment of not more than fifteen (15) days, or both, and in addition anyone convicted of a second offense thereunder shall be liable to pay a civil penalty of not less than $500 nor more than $1,000. Conviction of a subsequent offense within a year of the first offense shall be punishable by a fine of at least one thousand dollars ($1,000) and not more than two thousand dollars ($2,000) and/or loss of solid waste collection and disposal permit, or imprisonment of not more than thirty (30) days, or both, and in addition anyone convicted of a subsequent offense thereunder shall be liable to pay a civil penalty of one thousand dollars ($1,000). Conviction of any company, partnership, municipality or any entity other than an individual person, shall be subject to a fine of not less than $2,500 nor more than $5,000.

(c) The prosecution and enforcement of violators for any non-compliance with this law shall lie as follows: (i) Municipalities (city, town or village) in the County which provide municipal collection or contract for collection with private haulers shall prosecute and enforce such violations. (ii) To the extent municipalities do not provide for municipal collection or contract for collection with private haulers, the County shall prosecute and enforce such violations.

Section 13. Effective Date.

Upon approval of the County Executive, this local law shall be effective immediately as per the implementation schedule attached and made a part hereof as if fully set forth herein.

Section 14. Severability.

If any part of this ordinance is found to be illegal by a court of competent jurisdiction, the remaining sections shall remain in full force and effect.

Section 15.

This Local Law shall take effective immediately and shall be the final version of all passed and present legislation for the collection and disposition of solid waste thereby repealing and rendering null and void Local Law #2 of 1989 and Local Law #1 of 1988.

APPROVED: Environmental Conservation Committee (October 25, 1989)

Laws & Rules Committee (October 31, 1989)

Ways & Means Committee (November 15, 1989)

ADOPTED BY THE FOLLOWING VOTE:

AYES 34 NAYS 0

DATED: December 13, 1989

LOCAL LAW
INTRODUCTORY NO. 1 – 1990

A LOCAL LAW FOR THE COLLECTION AND DISPOSITION OF SOLID WASTE INCLUDING GARBAGE, RECYCLABLES, CONSTRUCTION AND DEMOLITION DEBRIS, APPLIANCES, FURNISHINGS, YARD WASTE, HOUSEHOLD HAZARDOUS WASTE, AND FARM HAZARDOUS WASTE, TO SUPPLEMENT LOCAL LAW 2 FOR THE YEAR 1988 AND AMEND CERTAIN SECTIONS THEREOF

BE IT ENACTED by the Legislature of the County of Herkimer:

Section 1. Definitions

(a) "Solid Waste" means all putrescible and non-putrescible solid wastes, including, but not limited to, materials or substances discarded or rejected as being spent, useless, worthless, or in excess to the owners at the time of such discard or rejection, or are being accumulated, stored, or physically, chemically or biologically treated prior to being discarded or rejected, having served their intended use, or as a manufacturing by-products [sic], including, but not limited to, garbage, refuse, industrial, commercial and agricultural waste sludges from air or water pollution control facilities or water supply treatment facilities, rubbish, ashes, contained gaseous material, incinerator residue, demolition and construction debris and offal, but not including sewage and other highly diluted water-carried materials or substances and those in gaseous form, special nuclear or by-product material within the meaning of the Atomic Energy Act of 1954, as amended, or waste which appears on the list or satisfies the characteristics or hazardous waste promulgated by the Commissioner of Environmental Conservation.

(b) "Garbage" means putrescible solid waste, including animal and vegetable waste resulting from the handling, storage, sale, preparation, cooking and/or serving of foods.

(1) "Household Garbage" originates primarily in home kitchens.

(2) "Commercial and Industrial Garbage"originates primarily in stores, markets, restaurants and other places where food is stored, prepared, and/or served; and the term shall also include all non-hazardous and non-toxic wastes which are not commercial and industrial by-products.

(c) "Hazardous Waste" includes pesticides and containers used for pesticides, used motor oil, automobile batteries, and all other materials, determined now or in the future to be hazardous by state or federal rule, regulation and/or statute.

(1) "Household Hazardous Waste" originates primarily in the home.

(2) "Farm Hazardous Waste" originates primarily on farms and/or results from farming activities.

(3) "Commercial and Industrial Hazardous Waste" originates primarily from commercial and industrial activities.

(d) "Yard Waste" means grass clippings, leaves, cuttings and other debris from shrubs, hedges and trees. "Garbage", "Recyclable Material", and "Construction and Demolition Debris" shall not be construed to include "Yard Waste".

(e) "Construction and Demolition Debris" means waste resulting from construction, remodeling, repair and demolition of structures, road building, and land clearing. Such wastes include but are not limited to bricks, concrete and other masonry materials, soil, rock, lumber, road spoils, paving material and tree and brush stumps.

(f) "Major Appliances" means a large and/or bulky household mechanism (as a refrigerator, washer, dryer, stove, etc.) ordinarily operated by gas or electric current.

(g) "Large Household Furnishings" means all other large and/or bulky articles actually used in the home and which equip it for living (as chairs, sofas, tables, beds, carpets, etc.)

(h) "Recyclable Material" means any material designated, from time to time, by Herkimer County which, under any applicable law or regulation, is not hazardous and which is separated from the waste-stream and held for its material recycling or reuse value.

(i) "Recyclable Commercial and Industrial By-products" includes all materials which are a by-product of production utilized in production or sale by a commercial enterprise or industrial enterprise.

(j) "Recyclers" means those persons who deal with recyclable material as collectors, separators and/or marketers. This definition includes not-for-profit corporations and charitable corporations which collect recyclables for fund raising purposes.

(k) "Source Separation" means the segregation of recyclable materials from the solid waste stream at the point of generation for separate collection, sale or other disposition.

(l) "Vehicular Tires" means tires from cars, trucks, domestic, recreational and farm vehicles.

(m) "Person" means any owner or owners of residential property, individual head of household, landlord, Chief Executive Officer, school superintendent, owner or manager of a commercial or industrial establishment.

(n) "Legislature" means the Herkimer County Legislature or for the purpose of this Local Law only, a Committee of the

Legislature, or an employee or officer of the County of Herkimer designated by the Legislature to perform duties under this Local Law and/or the regulations adopted pursuant thereto.

(o) "Household Metals" shall mean any empty metal food containers including aluminum, by-metal and steel cans.

(p) "Infectious Waste" shall be as defined in 6 NYCRR Part 360 as amended.

(q) Authority shall mean the Oneida-Herkimer Solid Waste Management Authority.

Section 2. Preparation of Solid Waste and Recyclable Material for Residential Collection.

In order to provide for public health and safety and to facilitate the conservation of vital natural resources, each city, town and/or village within the county shall provide for the collection of solid waste and recyclable material. Each municipality shall provide by June 30, 1990 to the Legislature a plan for approval to provide for such collection, which plan shall include the schedules required by Sections 4(a), 5(a) and 7(a) of this Local Law. Such plan must demonstrate that regular, reliable collection of solid waste and recyclable material will be provided to each property which generates that material in that municipality. Amendments to any such plan may be filed with the County but shall not be effective until accepted and approved by the Legislature.

The Legislature shall determine the schedule of implementation for collection of recyclable material in the County. If the Legislature has designated an employee, officer or committee, as provided in this Local Law, the determination shall be subject to approval by the Legislature.

After the schedule of implementation has been imposed in an area of the County and becomes effective by its terms, no

person shall dispose of garbage or recyclable or nonrecyclable material except as follows:

(a) In order to facilitate the conservation of vital natural resources through recycling: Each person shall provide for the separation of recyclable material in a suitable container or containers as authorized by the Legislature or as approved by the County of Herkimer or the Authority contracting with said County.

(b) In order to further facilitate the conservation of vital natural resources through recycling: Discarded newspapers, emptied glass containers, household metals, corrugated cardboard, plastics, high grade office paper and yard waste shall be separated from other nonrecyclable material and placed in authorized containers. The particular requirements for separation shall be established by the Legislature, or by the Authority pursuant to contract with the County.

(c) After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County. It shall be a violation of this Local Law for any person without authority from the Legislature to collect, pick up, remove or cause to be collected, picked up or removed any garbage or recyclable material placed at the roadside or other designated area and each such collection, picking up, or removal from one or more premises shall constitute a separate and distinct offense in violation of the Local Law. A person may dispose of their recyclables by selling or donating the same to recyclers, but these recyclables may not be picked up at the roadside.

(d) It shall be a violation of this Local Law for any person to place at the roadside or other designated area for collection

any can or container other than one which contains only garbage on [sic] recyclable material, except under regulations established by the Legislature.

(e) Tipping fees if necessary for the collection, handling and disposal of recyclables shall be established by the Legislature, or by the Authority pursuant to contract with the County.

Section 3. Public Sale of Recyclables.

(a) In order to facilitate the sale and/or marketing of recyclable material, the Legislature or the Authority pursuant to contract with the County shall request letters of interest from recyclers expressing their willingness to purchase recyclable material from the County. A list of interested parties shall be established.

(b) Prior to the sale of recyclable material, recyclers appearing on the list will be notified and given specifications with regard to available recyclable material for sale.

(c) In the event that recyclers bid on said recyclable material, it shall be required that said bid be written and delivered to the Legislature or the Authority in accordance with the specifications set forth.

In the case of awarding a bid, the highest bid price from a responsible bidder will be accepted. The Legislature and the Authority, however shall retain the right to reject all bids and authorize a rebidding.

(d) All sales and/or marketing of recyclables collected and separated shall be subject to bid. It shall be a term and condition of all bids for recyclables collected under this local law that the material purchased will be recycled and not landfilled or burned or otherwise not recycled.

Section 4. Preparation of Residential, Commercial and Industrial Construction and Demolition Debris and Disposal of the Same.

(a) Each city, town and/or village within the county shall provide a schedule for the collection of residential, commercial and industrial construction and demolition debris. Such material which is recycled or reused for construction shall not be regulated by this Local Law.

(b) Said debris shall be disposed of at the Demolition Debris Disposal Site or other suitable site as designated by the Legislature under the terms and conditions established by the Legislature.

(c) Tipping fees or other charges for the handling and disposal of residential, commercial and industrial and construction debris shall be established and modified by the Legislature as needed from time to time, or by the Authority pursuant to contract with the County.

Section 5. Preparation of Yard Waste and Disposal of the Same.

(a) Each city, town and/or village within the county shall provide a schedule for the collection of yard waste.

(b) Said yard waste shall be composted either by the County of Herkimer at a site or sites designated by the Legislature, or by the Authority pursuant to contract with the County or at sites approved by the Legislature operated by cities, towns or villages. Where allowed by law or regulation, this section shall not prohibit private composting of yard waste.

(c) Tipping fees or other charges for the handling and disposal of residential yard waste shall be established and modified by the Legislature as needed from time to time.

Section 6. Disposal of Commercial and Industrial Garbage and Recyclables.

(a) All commercial and industrial waste collected by either municipal haulers or private haulers shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County.

(b) All commercial and industrial recyclables designated for disposal at a County facility shall be packaged and collected in a manner designated by the Legislature, and delivered to a facility designated by the Legislature, or by the Authority pursuant to contract with the County.

(c) Tipping fees and other charges for the handling and disposal of commercial and industrial garbage and recyclables shall be established and modified by the Legislature, or by the Authority pursuant to contract with the County as needed from time to time.

(d) The materials collected by the metal industry and Recyclable Commercial and Industrial by-Products collected by recyclers shall be exempt from this Local Law. Any waste tendered for municipal collection by commercial and industrial enterprises shall not include such recyclables.

(e) Recyclable industrial and commercial by-products may be sold or donated by an industrial and/or commercial enterprise to any scrap metal enterprise or recycler. However, said materials cannot be placed at the curbside for collection by said scrap metal enterprise or recycler.

Section 7. Disposal of Major Appliances, Large Household Furnishings and Vehicular Tires

(a) Each city, town and/or village within the county shall provide a schedule for the collection of and disposal of major appliances, large household furnishings and vehicular tires.

(b) Said major appliances, large household furnishings and vehicular tires shall be disposed of by delivery to a site or sites designated by the Legislature or at sites approved by the Legislature, or by the Authority pursuant to contract with the County operated by city, towns or villages.

(c) Tipping fees or other charges for the handling and disposal of major appliances and tires shall be established and modified by the Legislature, or by the Authority pursuant to contract with the County as needed from time to time.

Section 8. Preparation of Household Hazardous Waste for Collection and Disposal of the Same.

(a) All household hazardous waste and farm hazardous waste shall be placed in a container determined by the Legislature, or the Authority pursuant to contract with the County.

(b) Household hazardous waste and farm hazardous waste shall be delivered to such facility as the Legislature, or the Authority pursuant to contract with the County shall designate.

(c) Tipping fees or other charges for the handling and disposal of residential hazardous waste shall be established and modified by the Legislature, or by the Authority pursuant to contract with the County[,] as needed from time to time.

Section 9. Disposal of Infectious Waste

(a) Commencing January 1, 1990 to March 1, 1990, all infectious waste as defined and regulated by Title 6 of the official compilation of Codes, Rules and Regulations of the State of New York (NYCRR) Part 360, shall be disposed of at a location designated by the County or by the Authority pursuant to a contract with the County and by a method specified and approved by the County or the Authority,

pursuant to contract with the County, and in compliance with all applicable State laws and regulations.

Section 10. Solid Waste Collection and Disposal Permit.

(a) Commencing January 1, 1990, all persons, companies or other [sic] engaged in the commercial collection, pick-up, transfer, removal and/or disposal of solid waste and/or recyclables, placed at the roadside or other designated location and as defined in this law shall obtain a permit issued by the County or by the Authority pursuant to contract with the County. Failure to obtain such permit shall prohibit a person, company or other entity from conducting such activities within the County. Failure to comply with this Subsection 10(a) shall subject the violator to the penalties set forth in Section 13.

(b) Failure to comply with the conditions and requirements of a permit issued pursuant to Section 10(a) hereof shall subject such person, company or entity to a revocation of such permit and revocation of all rights and privileges to collect, pick up, transfer, remove or dispose of solid waste or recyclables as defined herein, and further such failure to comply with this Subsection 10(b) shall subject the violator to the penalties set forth in Section 13.

Section 11. Prohibition Against Unauthorized Dumping.

By adoption of this law, the Herkimer County Legislature also declares its intent to regulate the throwing, dumping, depositing and placing of solid waste and recyclable material on lands within Herkimer County. This ordinance shall apply to throwing, dumping, depositing and placing of solid waste and recyclable material upon all lands, public or private, within Herkimer County and thereon only in the manner herein provided:

(a) In order to provide for public health and safety and to facilitate the conservation of vital natural resources: each

person shall provide for the removal of garbage and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator to a disposal location approved by the County or the Authority pursuant to contract with the County.

(1) It shall be a violation of this law for any person to place for the purpose of collection solid waste and/or recyclables at a property other than the property generating said material.

(2) It shall be a violation of this law for any person to place solid waste and/or recyclable material in dumpsters and/or containers designated for solid waste use by commercial and/or industrial establishments.

(3) It shall be a violation of this law for any person to bury and/or burn solid waste material on public or private property.

(4) It shall be a violation of this law for any person to throw, dump, deposit or place solid waste and/or recyclable material along the roadside or on public and/or private property within Herkimer County.

(5) It shall be a violation of this law for any person to cause to be thrown, dumped, deposited, or placed solid waste and/or recyclable material along any public or private road or on lands bordering such roads.

Section 12. Rules and Regulations.

(a) Rules and regulations imposed for the purpose of implementing the provisions of this Local Law shall be adopted or approved by the Herkimer County Legislature.

(b) Before adopting or approving such rules and regulations the Committee on Solid Waste of the Herkimer

County Legislature, or such other committee as shall be designated, shall hold a public hearing upon at least five (5) days notice to consider the proposed rules and regulations. Such notice shall be published one time in the official newspapers of the County and mailed by regular mail to the supervisors of all the towns and the mayors of the city and villages in the County.

(c) Said rules and regulations shall not become effective until ten (10) days after adoption or approval by the Herkimer County Legislature. During such ten (10) day period the Legislature shall, by such means it deems proper, publicize the said rules and regulations.

Section 13. Enforcement: Penalties

(a) Any person who violates any provision of this Local Law, or any rule or regulation issued pursuant thereto, which has been approved by the Legislature, shall be guilty of an offense punishable, by a fine of One Hundred to Five Hundred Dollars ($100.00-500.00), and in addition thereto, shall be liable to pay a civil penalty of Two Hundred Fifty to Five Hundred Dollars ($250.00-500.00); for a second violation within one year of the first violation shall be guilty of an offense punishable by a fine of Five Hundred to One Thousand Dollars ($500.00-1,000.00), or by imprisonment for up to Fifteen (15) days, or both, and in addition thereto, shall be liable to pay a civil penalty of Five Hundred to One Thousand Dollars ($500.00-$1,000); for a third and each subsequent violation shall be guilty of a misdemeanor punishable by a fine of not less than One Thousand Dollars ($1,000.00), or more than Two Thousand Dollars ($2,000.00), or by imprisonment for up to Thirty (30) days, or both, and in addition thereto, shall be liable to pay a civil penalty of One Thousand Dollars ($1,000.00) to Two Thousand Dollars ($2,000.00). Each violation shall be a separate and distinct offense and, in the case

of a continuing violation, each day's continuance thereof shall be deemed a separate and distinct violation. Corporations, companies, partnerships and municipalities shall be subject to the monetary fines and civil penalties set forth above.

(b) The prosecution and enforcement of violations for any non-compliance with this law shall lie as follows: Municipalities (city, town or village) in the County which provide municipal collection of solid waste or any type thereof or contract for such collection with private haulers shall prosecute such violations. If municipalities neglect or refuse to prosecute such violations or if municipalities do not provide for collection or contract for collection with private haulers, the County shall prosecute such violators.

(c) In the event that a person shall be found guilty of violating this Local Law he shall be liable for civil penalties as set forth in subparagraph (a) above and also for further civil penalties in the amount of reasonable attorneys fees, costs of expert witnesses, costs of testing if and when necessary for prosecution and other reasonable and necessary costs associated with the prosecution of the action.

(d) The County Attorney is authorized to commence an action in any court of competent jurisdiction to adjoin any violation of this Local Law when directed by the Herkimer County Legislature.

Section 14. Implementation.

(a) The County of Herkimer shall cause to be drawn up an implementation schedule or schedules which shall list all portions of this Local Law previously implemented and all portions thereof which remain to be implemented. Such schedule or schedules shall be mailed by certified mail return receipt requested to each municipality, addressed to the clerk of

the governing board of the municipality. Said schedule or schedules shall be effective upon the date of such mailing.

Section 15. Severability.

If any part or section of this ordinance is found to be illegal by a court of competent jurisdiction, the remaining parts or sections shall remain in full force and effect.

Section 16. Effective Date:

(a) This Local Law shall take effect immediately.

Supreme Court, U.S.
FILED
DEC 7 2001
CLERK

No. 01-686

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY

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SUMMARY OF THE ARGUMENT

The Court should deny the Petition because the decision of the Second Circuit Court of Appeals is interlocutory, and further proceedings in the district court are required to develop the factual record necessary to determine whether the ordinances in question violate the Dormant Commerce Clause (U.S. Const. Art. I, § 8, cl. 3). The court below expressly recognized the possibility that the district court, applying the *Pike v. Bruce Church*, 397 U.S. 137 (1970) balancing test to a full set of facts, might allow petitioners to prevail on their claim.

The record is inadequate because there has been no fact finding on the nature and extent of the alleged injury to interstate commerce; no identification of the out-of-state economic interests allegedly affected by the Oneida-Herkimer legislation; no evidence of any alternatives available to the counties to achieve their objectives in waste management; and no exploration of the interplay between these regulations and those of municipalities in other states.

On the merits, the decision below is entirely consistent with *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994) and the Court's other processing cases. The court of appeals properly distinguished this case from *Carbone* because the burdens of the Oneida-Herkimer regulatory scheme fall equally on all private sector actors, regardless of local or interstate location. Oneida-Herkimer's legislation affects no waste generated in other states, and targets no out-of-state business for different treatment from any local business. The court's conclusion that strict scrutiny should not be invoked under such circumstances is fully consistent with the long-established precedents of this Court.

The Second Circuit's decision does not conflict with the decision of any other appellate court, because no other court has yet addressed it. Petitioners argue that its outcome is "inconsistent" with results elsewhere. (Pet. 17). This Court does not review "inconsistencies," but instead resolves conflicts. The cases cited by the petitioners and their *amici* only reflect the diversity of approaches to waste management taken by governmental entities across the country, not conflicting approaches to constitutional analysis.

Finally, this is not an exceptional case that warrants immediate review. The ruling below does not create a "sea change" in the law, nor does it add or detract from existing public responsibilities in waste management. Contrary to petitioners' hyperbole, this decision will not reduce the continued reliance of state and local governments upon the interstate trade in waste services.

STATEMENT OF FACTS

Prior to 1989, the waste management practices of both the private and public sectors in the New York counties of Oneida and Herkimer were woefully disorganized and environmentally hazardous. The counties and the state endeavored to protect the health and safety of the public with a comprehensive plan to build several new facilities within an overall program to be administered by a new public agency organized solely for that purpose, the Oneida-Herkimer Solid Waste Management Authority. (Pet. App. 4a). This undertaking was an exercise of traditional municipal sovereign power, which necessarily regulated and curtailed the activities of all private waste businesses, as well as every person generating waste in the counties.

The petitioners in this case are local waste collectors. Prior to the institution of the public waste management system, they were accustomed to delivering waste to dump sites of their own choosing, and wish to do so again. Petitioners' objective in this case is to be free of the obligation to participate in the regional waste plan, and regain the ability to landfill waste at the location of their choice. The counties' objectives are to reduce the amount of local waste going to landfills overall, ensure safe and proper disposal, and increase the amount being recycled. The difference between these public and private objectives is at the heart of this dispute.

REASONS FOR DENYING THE WRIT

I. The Non-Final Nature of the Decision Below Counsels Against Certiorari

The petitioners sued the respondents in April 1995, moved for summary judgment based on affidavits and accompanying legislative documents in June 1995, and oral argument occurred in October 1995. Petitioners obtained a stay of discovery pending resolution of the summary judgment motion. The court of appeals noted: "Accordingly, no discovery took place prior to the district court's determination of United Haulers' summary judgment motion that is the subject of this appeal." (Pet. App. 18a-19a).

The court below reversed the summary judgment, disagreeing with the trial court's application of the Commerce Clause and "remand[ed] to the district court to consider whether the ordinances impose burdens on interstate commerce that are clearly excessive in relation to the local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)." (Pet. App. 2a). The court admitted to a "temptation

to undertake the *Pike* balancing test in the first instance," but "resist[ed] the temptation to rule as a matter of law prior to adequate discovery and further argument by the parties, which will undoubtedly assist the district court in this fact–intensive determination." (Pet. App. 32a).

Two principles counsel against granting certiorari. First, even if the question presented ("whether the prohibition against 'hoard[ing] solid waste' recognized in *Carbone* is inapplicable when the 'preferred processing facility' is owned by a public entity") (Pet. (I)) presents a potentially interesting issue, its ultimate resolution would be better decided on a factual record that conveys a complete picture. In *Askew v. Hargrave*, 401 U.S. 476 (1971), the court counseled against precipitously deciding on remand the equal protection question: "Since the manner in which the program operates may be critical in the decision of the equal protection claim, that claim should not be decided without fully developing the factual record at a hearing." *Id.* at 477.

In this case, the Oneida-Herkimer flow control ordinances affect haulers, landfills, recyclers, transfer stations and ultimately, the citizens and businesses of the two counties. This Court has

> recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. ***In either situation, the critical consideration is the overall effect of the statute on both local and interstate activity.***

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986) (emphasis supplied).

The *Askew v. Hargrave* homily applies to the instant Commerce Clause inquiry, and provides a reason for denying certiorari. *See also Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948) ("Summary procedures . . . present a treacherous record for deciding issues of far flung import. . .").

Those concerns are buttressed by the jurisprudential caution toward review of interlocutory orders. *See American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893) (review of an interlocutory order should not occur "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until the final decree"); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this court"); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993). ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., concurring).

We do not ignore the plea of the Petition, p. 22 ("It is imperative that this Court review and reverse . . . now . . .") and *amicus* New Jersey's desire to have the Court grant review and affirm the decision below ("New Jersey however, parts with petitioner by asking the Court to uphold the decision of the Court of Appeals. . ."). (*Amicus Curiae* Brief of New Jersey in Support of Certiorari, p. 2). Their differing views on the correctness of the interlocutory decision below adds to the reasons for the Court having a fully-developed

record and a final decision on the merits before it considers whether certiorari review is necessary or appropriate. Only then, if review were granted, would the Court be able to confidently adjudicate any Commerce Clause dispute.

Denial of certiorari review of an interlocutory decision does not preclude presentation of the same questions if certiorari is sought after a final judgment, if the questions are properly preserved. *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 672 n.19 (1979). Therefore, patience — in the form of awaiting a final judgment — will allow the petitioners and their *amici* to seek review later, if they are dissatisfied with the final judgment.

Recently, after full briefing and oral argument, the Court dismissed a writ of certiorari as improvidently granted despite the importance of the question because "it would require a threshold inquiry into issues decided by the Court of Appeals but not presented in the petition for certiorari." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. __ (November 27, 2001). The Court wrote:

> Petitioner points out that this case presents questions of fundamental national importance calling for final resolution by this court. But the importance of an issue should not distort the principles that control the exercise of our jurisdiction. To the contrary "by adhering scrupulously to the customary limitations on our discretion regardless of the significance of the

> underlying issue, we promote respect . . . for the Court's adjudicatory process."

Id., Slip Op. p. 7 (citations omitted).

Here, denying the writ would be consistent with customary limitations on the Court's discretion, but would not foreclose review if sought after final judgment.

II. The Court of Appeals Correctly Distinguished the Oneida-Herkimer Laws From Those of Clarkstown, and the Decision Is Not in Conflict with *Carbone*

The court of appeals decision does not "circumvent" this Court's decision in *C&A Carbone v. Town of Clarkstown*, or threaten to render it "a dead letter." (Pet. 2-3). Petitioners incorrectly read *Carbone* to require that the courts eschew the "sensitive case by case analysis of purposes and effects" called for by *West Lynn Creamery, Inc v. Healy*, 512 U.S. 186 (1994), in favor of a result that protects private interests over public ones whenever there is conflict.[1] (Pet. 14).

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1. Contrary to the implication in the petition (p. 14), the court of appeals did not say, or even imply, that if legal title to a designated facility were held by a private company, the result would be that the designating legislation is "per se" unconstitutional, or otherwise pre-ordained. The Second Circuit has painstakingly reviewed numerous flow control statutes after *Carbone*. *See SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir 1995), *cert. denied*, 516 U.S. 1112 (1996); *USA Recycling v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), *cert. denied*, 517 U.S. 1135 (1996); *Gary D. Peake Excavating Inc. v. Town Bd. of Town of Hancock*, 93 F.3d 68 (2d Cir. 1996); *Sal Tinnerello & Sons, Inc. v. Town of Stonington*, 141 F.3d 46 (2d Cir. 1998), *cert. denied*, 525 U.S. 923 (1998); *Automated Salvage Transport Inc. v. Wheelabrator*, 155 F.3d 59 (2d Cir. 1998); *Incorporated Village of Rockville Centre v. Town of Hempstead*, 196 F.3d 395 (2d Cir. 1999).

The court of appeals correctly recognized that when local government regulates for health and safety, it acts as a sovereign, which means it is in a different class than the entities it regulates. Contrary to the petitioners' argument (Pet. 14-15), the court's identification of the sovereign's interest in its legislation is hardly the "formalistic distinction" this Court rejected in *West Lynn Creamery*. It is indispensable to any constitutional analysis.

The Second Circuit did not arrive at the result reached here through a shortcut analysis. The differences between the legislation presented in *Carbone* and the regulations examined here are clear and substantial. The court noted several features of the Clarkstown scheme which are not present in Oneida-Herkimer's system, and others which are present here but were not evident in Clarkstown.

A. Legislative Differences Between the Clarkstown and Oneida-Herkimer Regulatory Systems

First, there is no "over-reaching" by Oneida-Herkimer to capture waste generated in other counties or other states, where Clarkstown purported to control waste generated in New Jersey. (Pet. App. 21a). None of the petitioners alleged that they handle any waste generated in other states, and the local laws would not prevent them from doing so if they did. (Pet. App. 21a n.4). The Authority's authorizing legislation actually prohibits the acceptance of waste generated outside of the counties at Oneida-Herkimer's facilities. (Pet. App. 4a).

Second, there is no local operator receiving any arguable benefit from the local legislation. (Pet. App. 22a). In Clarkstown, the ordinance required the public and local

haulers to pay fees directly to the private transfer station operator. In Oneida-Herkimer no contractor is empowered to charge or collect fees. The disposal transaction is between the public or their licensed haulers, and the Authority.

Third, with the acceptance of the waste comes title and public responsibility for its ultimate disposal. Once it accepts delivery, Oneida-Herkimer is directly responsible for fulfilling its disposal obligations. Virtually all of Oneida-Herkimer's waste has been disposed of in interstate commerce (at Pennsylvania landfills or with recyclables markets in dozens of states and Canada) since 1991. (Pet. App. 6a-7a). Clarkstown, on the other hand, was not obliged to either collect fees, arrange for disposal, or handle the waste in any way.

Fourth, the Oneida-Herkimer facilities were planned and constructed after a long and deliberative public process, undertaken after the demonstrable failure of private enterprise and decentralized public efforts to address the waste problem. (Pet. App. 2a-5a). In contrast, Clarkstown's 1990 legislation was adopted as a quick fix to deal with the imminent closure of the Town's unlined landfill, pursuant to its August 1989 Consent Order. *Carbone*, 511 U.S. at 383.

The most significant difference between this case and *Carbone* can be found in the purposes of the laws. In Oneida-Herkimer, a public agency was created to procure, construct, and operate facilities capable of handling all of the region's waste pursuant to a long range plan adopted with public participation. The Authority is a party to all of the disposal transactions which take place, and thereby assumes the responsibilities and potential liabilities which go with it. (Pet. App. 3a). *See* Comprehensive Environmental Response,

Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (CERCLA); *BF Goodrich v. Murtha*, 958 F.2d 1192 (2d Cir. 1992).

In contrast, the Clarkstown legislation was designed to ensure the consummation of private commerce, and if the local legislation had been successfully enforced, to keep the Town *out* of the disposal business. As all of the opinions in *Carbone* recognized, the Clarkstown legislation would not involve the commitment of public funds or government responsibility *unless* the tonnage guaranteed to the private operator did not materialize. If the tonnage did arrive, on the strength of the local ordinance, the operator would be enriched and the Town would not be responsible for disposal.

Here the Second Circuit, comparing the two legislative schemes, recognized the critical difference.

> Moreover, ordinances that favor a public facility to the detriment of all private actors are equipped with a built-in check: municipal legislators are accountable to citizens, many of whose interests are likely to be aligned to some degree with the interests of private business. . . . Where local legislation benefits local industry to the detriment of its competition, as in all of the processing cases, this check is inadequate. Here it is not.

(Pet. App. 28a).

B. The Oneida-Herkimer Laws Present No Risk of Retaliatory Measures by Other States

The petitioners also argue that the laws amount to "local economic protectionism," and that this will invite retaliation from other states. (Pet. 13-14). The absence in the Oneida-Herkimer legislation of any interstate reach to capture waste generated in other states largely eliminates any risk of retaliatory action by a neighboring state. In *Carbone* it was the effect of the Clarkstown legislation on waste originating in New Jersey which supported the Court's finding that Clarkstown's law "drives up the cost for out-of-state interests to dispose of their solid waste." 511 U.S. at 389.

More importantly, retaliation will not occur because Oneida-Herkimer is simply exercising its municipal power, derived from the sovereign power of the State of New York, to provide the same sort of governmental service which all other states have traditionally provided to their citizens.

The power to provide exclusive municipal waste disposal service was recognized by the Supreme Court almost one hundred years ago in *California Reduction Company, et al. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306 (1905), when the Court rejected a challenge by local waste "scavengers" to San Francisco's award of a disposal franchise to a single company. In 1976, Congress acknowledged (without expanding or diminishing) the traditional power of states and local governments to regulate for the provision of comprehensive waste services in the Resource Conservation and Recovery Act (42 U.S.C. § 6901 *et seq.*) ("RCRA"). RCRA is the foundation for all of the solid waste management plans which have since been adopted by the states, and within the states, by designated planning jurisdictions, including

Oneida-Herkimer.[2] RCRA's "blueprint" for national reform in waste management calls for new methods focusing on waste reduction and recycling, to be managed primarily by state and local government. 42 U.S.C. § 6901(a)(4).

RCRA's planning provisions contemplate that different solutions to the nation's waste problems would be attempted in different areas of the country, each tailored to the unique local geography, population, customs, and practices in the community. This approach pre-supposes the continued exercise of sovereign state power to regulate — in an even-handed, nondiscriminatory manner — the activities of the private sector. There is no suggestion here that New York's regulatory scheme (of which Oneida-Herkimer's is a part) interferes with the regulations of other states. However, as the court of appeals noted, should petitioners present evidence of any such interference, "the *Pike* test is a suitable vehicle for meaningful judicial review." (Pet. App. 29a).

III. The Decision Is Not in Conflict With Any Decision of Another Circuit Court of Appeals

Petitioners argue that the decision below is "inconsistent" with the decisions of other courts of appeals which have invalidated flow control laws directing waste to public facilities. (Pet. 17). They concede, as the Second Circuit pointed out, that the cases cited did not address the public/private distinction, and therefore they cannot argue that there is actual conflict between the circuits on the same important matter. Rather, they stress an inconsistency in result, and fear a trend of decisions upholding non-discriminatory regulation which restricts the actions of the private sector generally.

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2. No plan was adopted by Clarkstown, which is not a designated planning unit under New York Law.

A review of the regulatory approaches taken in the cases cited by both the petitioners (Pet. 17-19) and the court of appeals (Pet. App. 29a-30a) confirms a variety of particular problems, proposed solutions, regulatory philosophies, and difficulties with the private sector. The waste management challenges facing localities as diverse as western Kentucky,[3] northern and central Minnesota,[4] metropolitan Nashville,[5] rural Nebraska,[6] south Florida[7] and all of New Jersey[8] were each unique and reflective of local conditions. Local problems give rise to different regulatory solutions, which impact different interests in different ways.

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3. *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707 (6th Cir. 2000).

4. *Randy's Sanitation v. Wright County*, 65 F.Supp.2d 1017 (D. Minn 1999); *Zenith Kramer Waste Systems v. Western Lake Superior Sanitary District*, 1996 WL 612465 (D.Minn. 1996).

5. *Waste Management Inc v. Metropolitan Govt.*, 130 F.3d 731 (6th Cir 1997).

6. *U&I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir 2000).

7. *Coastal Carting Ltd. v. Broward County*, 75 F.Supp.2d 1350 (S.D. Fla. 1999).

8. *Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995). New Jersey's statutory scheme has been extensively litigated. Certiorari for *Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995), was denied in *Essex County Utilities Authority v. Atlantic Coast Demolition & Recycling*, 522 U.S. 966 (1997) and *Shinn v. Atlantic Coast Demolition & Recycling*, 522 U.S. 966 (1997).

Yet the courts reviewing challenges to these diverse regulations have uniformly applied the constitutional analysis described in *Carbone* and this Court's other Commerce Clause cases. This case presented the Second Circuit with facts highlighting the distinction between public and private sector services, with "no confusion or room for debate regarding the ownership of the favored facilities." (Pet. App. 31a). Other cases in other jurisdictions have not been free of confusion or debate over ownership or local private benefit, and reviewing courts have often found alternate grounds for decision. This does not amount to conflict, but simply reflects the application of uniform principles of law to difficult and diverse facts.

The courts are upholding the regulatory solutions which do not conflict with the Commerce Clause, and striking down those that do. This is a process which will continue, just as private interests will continue to chafe against public regulation. This case, like the *Carbone* decision itself, "while perhaps a small new chapter in that course of [waste transfer and treatment] decisions, nevertheless rests upon well-settled principles of our commerce clause jurisprudence." 511 U.S. 383, at 386.

IV. The Market Participation Doctrine Is Not Applicable

It is the exercise of sovereign power by local government which eliminates any "tension" (Pet. 15-16) between the market participant doctrine and the decision here. Market participation, under the relevant decisions of this Court, is government action which is excepted from scrutiny under the dormant Commerce Clause. It arises only when the government acts as a buyer or seller in the market, not as a sovereign regulating the actions of others. *Hughes v.*

Alexandria Scrap Corp., 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). Here the Oneida-Herkimer respondents are indisputably regulating, and have not claimed market participant status for any of their actions.

Nevertheless, petitioners assert that reviewing these local laws under the *Pike* balancing test somehow gives municipalities "carte blanche" to "be emboldened to enter any number of markets and then use their regulatory powers to favor themselves over private interstate competitors." (Pet. 16-17). How this would occur, the petitioners do not make clear. There is a large body of law governing the limits of municipal restraint of competition in private markets, (*e.g.*, *Parker v. Brown*, 317 U.S. 341 (1943); *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389 (1978)) which would constrain such boldness. The *Pike* test, applied below, will afford petitioners an opportunity to elaborate on this prediction.

V. The Decision Is Not So Important as to Require the Court's Immediate Attention

Finally, the petitioners argue that this Court must immediately accept this case for review in order to prevent a "sea change" in the way the nation's waste is handled. (Pet. 22). There is nothing in the record made thus far to support such hyperbole. Much, if not most, of the nation's waste already moves in interstate commerce, and is likely to continue to do so. Nothing about flow control makes it easier for municipalities to site and build waste disposal facilities within their jurisdictions. Almost every major metropolitan area in the country long ago closed the last of the local landfills, and virtually all of them rely on the interstate market for disposal capacity. This will not change due to the decision below.

While states and local governments continue to bear the responsibility to provide safe and effective waste management for their own citizens, no state is anxious to manage the waste generated by its neighbors. To the contrary, local governments which have managed to find effective solutions which do not involve siting, building or acquiring public facilities are not likely to reverse course. Public waste management solutions remain "expensive and time-consuming" even as this decision serves to remove some of the constitutional "guesswork" and "fill[s] in one more piece of the puzzle." (Pet. App. 12a).

In any case, the decision below works no hardship on the petitioners, as they may pursue their arguments in the district court to show that the incidental burdens of the legislation outweigh its putative benefits. If they can establish, with additional facts, that the disparity between the benefits and the burdens is great enough, they may yet prevail. Whether they do or not, this case may again make its way to this Court, when the merits or demerits of the legislation can be reviewed on a full and complete record.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 01-686

In the

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC. TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC. AND INGERSOLL PICKUP, INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE STATE OF NEW JERSEY IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF AMICUS CURIAE

As the most densely populated state in the union, located between major metropolitan centers, New Jersey has long been a battleground over solid waste disposal. The scarcity of open space for landfill facilities, combined with a large waste-generating population, has forced New Jersey to expend tremendous government resources and energy to ensure safe and adequate disposal capacity for the waste generated by its citizens. Some of those efforts, such as New Jersey's 60 % recycling rate, have been huge successes. Others, such as its effort to preserve in-state landfill capacity for in-state generators, have not. *See*, *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

The legal uncertainty regarding permissible government regulation of solid waste collection and disposal has compounded the problem. After *Philadelphia v. New Jersey*, New Jersey's counties embarked on a State-mandated program to finance and build sufficient in-state capacity to dispose of New Jersey's waste. Critical to the success of this program was flow control, which guaranteed the flow of waste and revenue necessary to maintain this capacity. Flow control originally withstood legal challenge, based on a finding that the local benefits outweighed the incidential burden on commerce. *J. Filiberto Bros. Sanitation v. NJDEP*, 857 F.2d 913 (3rd Cir. 1988). However, long after over $1.5 billion in public debt had been incurred to build facilities, the Third Circuit reversed its prior ruling, based on this Court's decision in *Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994). *Atlantic Coast Demolition and Recycling v. Board of Freeholders, Atlantic County*, 48 F.3d 701 (3d Cir. 1995), *after remand*, 112 F.3d 652 (3d Cir. 1997), *cert. denied*, 522 U.S. 966 (1977). While the State and counties have been working since *Atlantic Coast* to meet the financial obligations of New Jersey's public facilities,

it now turns out that had the New Jersey counties that built their own facilities been located across the New York border, the financial crisis they face due to the decision in *Atlantic Coast* may not have occurred. *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001).

The Court below acknowledged that it was deciding an issue that had been left open by this Court in several solid waste Commerce Clause cases. The Court below also acknowledged that, "these missing pieces to the constitutional puzzle often force states and municipalities to engage in guesswork about the constitutionality of proposed solid waste management schemes, which are expensive and time-consuming to implement." 261 F.3d at 253. Nowhere is an answer to this open question needed more than in the State of New Jersey, where over $200 million has already been expended from the State Treasury to prevent defaults on public debt obligations and where over $1 billion in public solid waste debt remains outstanding. New Jersey thus joins the petitioner in asking this Court to resolve this open issue. New Jersey however parts with petitioner by asking the Court to uphold the decision of the Court of Appeals for the Second Circuit that the Commerce Clause does not bar local governments from assuming responsibility for managing solid waste -- an article of commerce that implicates substantial public health and environmental concerns.

STATEMENT OF FACTS

The facts of this case are set forth fully in the briefs of the parties and the decision below. *Amicus* seeks to add a brief discussion of New Jersey's solid waste system so that the Court may understand the similarities to the system upheld below.

Since the 1970's New Jersey has regulated the collection, processing and disposal of solid waste through the Solid Waste Management Act, N.J. Stat. Ann. 13:1E-1 *et seq.* ("SWMA"), and the Solid Waste Utility Control Act, N.J. Stat. Ann. 48:13A-1 *et seq.* ("SWUCA"). The SWMA requires each county to develop a comprehensive plan for the collection, transportation and disposal of all solid waste generated in the district. N.J. Stat. Ann. 13:1E-19, 13:1E-21. The New Jersey Department of Environmental Protection ("DEP") reviews and certifies each district plan to ensure its consistency with statewide solid waste management objectives, criteria and standards. N.J. Stat. Ann. 13:1E-24. Under SWUCA, all solid waste facilities in the state were designated as utilities, thus subject to rate regulation ensuring a guaranteed rate of return in exchange for agreeing to accept all waste from within their service areas. N.J. Stat. Ann. 48:13A-1 *et seq. See generally, Atlantic Coast, supra,* 48 F.3d at 705.

The need for comprehensive public management of solid waste in New Jersey arose out of a crisis in the 1970's, as the development of new, environmentally-sound disposal sites could not keep pace with the closure of old dumps and the increase in solid waste generation. *See, Southern Ocean Landfill v. Mayor & Council, Tp. of Ocean,* 64 N.J. 190, 314 A.2d 65 (1974). In addition, the Legislature's actions were prompted by New Jersey's long history of anti-competitive conduct in the solid waste industry. *See, Trade Waste Management v. Hughey,* 780 F.2d 221 (3d Cir. 1985). As

unsafe facilities within the state were closed, New Jersey became a net exporter of waste. At times, New Jersey was turned away from out-of-state landfills, as neighboring states also grappled with outdated and unsafe facilities. *Atlantic Coast, supra,* 48 F.3d at 704. Accordingly, New Jersey pressed forward with its ambitious program to reduce the amount of waste it generates through mandatory recycling and to build state-of-the-art capacity for the remainder of its waste.

The plans adopted by New Jersey's counties to manage and plan for solid waste varied. Some counties contracted with private companies to reserve space at their facilities for the amount of waste the county expected to generate over the contract period. Through the approval of county plans and state regulations, waste in those counties was then directed to the private facility. Other counties expended substantial public resources to construct incinerators, landfills and transfer stations. Once built, those publicly-owned facilities were either operated by county utility or improvement authorities or by private companies hired by the county authorities through public bidding. Waste generated within those counties was directed to these facilities through county plan approval and state regulation. *Id.* at 706-7.

Counties that chose to build facilities financed those projects through revenue bonds issued by the counties or by their utility and improvement authorities. These bonds, representing billions of dollars of public debt, were backed by the revenue assured by the guaranteed flow of waste to the publicly owned facility. *Id.* at 707. By 1990, thirteen new facilities had been built with public funds. *Id.* at 704.

After the Third Circuit determined in *Atlantic Coast* that *Carbone* invalidated New Jersey's waste flow system, each county struggled to address the new legal landscape. Those

counties that contracted with private entities for solid waste services modified their systems. Disposal contracts were either rebid in a process open to both in-state and out-of-state bidders, as permitted by the decision in *Harvey & Harvey v. Delaware Solid Waste Authority*, 68 F.3d 788 (3d Cir. 1995), *cert. denied*, 516 U.S. 1173 (1996), or waste was permitted to flow freely based on market forces or voluntary municipal contracts. *

Counties, however, that expended public funds to construct facilities could not as easily modify their systems and still pay the debt incurred. Their rates were higher than many out-of-state facilities, due to factors such as availability of open space and density of population, the inability to reject unprofitable portions of the waste stream, and various taxes and surcharges designed to pay for recycling programs and ensure the proper closure of landfills. These counties could not simply reinstitute waste flow through a non-discriminatory bidding process as the entity awarding the bid would also be one of the bidders. It was thus impossible to create the "level playing field" necessary to satisfy the Commerce Clause. *Id.* Other efforts to offset debt payments and allow these public facilities to compete economically with landfills in less populated areas also failed. *See, In the Matter of Passaic County Utilities Authority,* 164 N.J. 270 (2000).

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* Descriptions of the various county plan amendments can be found on the Department of Environmental Protection's website at *www.state.nj.us/dep/dshw/recycle/cntypus.htm* (summary only); and *www.state.nj.us/dep/dshw/recycle/admentme/index/htm* (text of plan amendments).

As a result, the State has stepped in to subsidize the debt payments of certain counties and forgive certain solid waste-related state loans in order to prevent default and the difficulties that could result for public agencies statewide that seek to raise capital. These subsidies and loans, totalling over $200 million dollars, are only a preliminary solution.* Over $1 billion in public solid waste debt remains outstanding.

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* Eligibility for these funds was contingent upon an audit of the local authority conducted by the State Treasurer to ascertain measures that could be taken to reduce the amount of subsidy needed. Copies of those audits appear on the Department of Treasury website at *www.state.nj.us/lgbr/muacpltr.htm.*

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE IMPORTANT PUBLIC ISSUE IT LEFT OPEN IN *PHILADELPHIA V. NEW JERSEY,* AND TO RESOLVE A CONFLICT IN THE CIRCUITS.

1. In *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) the Court barred New Jersey from restricting the ability of private landfill operators to accept and process solid waste from outside the state. Although the Court recognized the economic and environmental goals of New Jersey's prohibition, the Court found that the means of achieving them "imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." *Id.* at 626-28. The Court, however, made clear that "[w]e express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources, ... or New Jersey's power to spend state funds solely on behalf of state residents and businesses." *Id.* at 627, n.6 (citations omitted).

Fourteen years later, in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992), the Court applied the ruling in *Philadelphia v. New Jersey* to Michigan's solid waste management system, which prohibited private landfills from accepting waste from different counties within the State. Once again, the Court was careful to stress that the case did not "raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities. The case involves only the validity of the Waste Import Restrictions

as they apply to privately owned and operated landfills." *Id.* at 358-59. *See also, Oregon Waste Systems v. Department of Environmental Quality, State of Oregon*, 511 U.S. 93, 106, (1994) n.9 (noting that the case did not require the court to decide whether Oregon could spread the cost of solid waste management through market participation or other means not involving the regulation of private interstate commerce).

Carbone v. Town of Clarkstown, 511 U.S. 383 (1994), upon which the opponents of flow control universally rely, also involved a private facility, and thus did not directly decide the issue raised herein. The Court did, however, note that public ownership and/or subsidy would effect the legality of a flow control measure. The Court stated:

> Clarkstown maintains that special financing is necessary to ensure the long-term survival of the designated facility. If so, the town may subsidize the facility though general taxes or municipal bonds. But having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State. *Id.* at 393.*

Thus, this Court has not ruled on the legality of a flow control measure where a government agency, rather than electing "to use the open market," has instead invested public funds to

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* Given this language, Petitioner is incorrect in stating that the decision below was inconsistent with *Carbone*. *Carbone* did not directly decide the issue and in *dicta* indicated that public investment was an alternative consistent with the Commerce Clause.

control solid waste management within its borders and/or build public facilities.

2. The absence of a ruling on this issue has created a quagmire for local officials seeking to ensure safe and adequate disposal of waste generated by their citizens. Contrary to Petitioner's assertions, *Carbone* has not been interpreted to require virtually automatic invalidation of flow control measures. Many Federal and State courts have permitted flow control under specific circumstances, so that the validity of these public measures literally depends on the jurisdiction in which the challenge is heard and hair-splitting distinctions between the provisions at issue.

For example, several courts have found that a government entity that enters the market as either a buyer or seller of solid waste disposal or collection services may regulate the flow of waste without violating the dormant Commerce Clause. The Courts of Appeals for the Third and Eighth Circuits have held that county and city-owned and operated landfills may bar waste from outside the jurisdiction. *Red River Service Corp. v. City of Minot, North Dakota*, 146 F.3d 583 (8th Cir. 1998); *Swin Resource Systems v. Lycoming County, Pa.*, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990) The Second Circuit in the decision below, held that a county could direct waste generated by its citizens to a local facility, as long as that facility was publicly owned. *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority, supra*, 261 F.3d 245. The Third Circuit, however, found New Jersey's system of directing waste to publicly owned facilities violated the Commerce Clause. *Atlantic Coast Demolition and Recycling v. Board of Freeholders, Atlantic County, supra.*

Where the government entities are the purchasers of solid waste services, the confusion is even greater. Several Courts of Appeals have held that a government entity may award exclusive rights to collect, process or dispose of waste as long as the system for choosing the exclusive provider does not discriminate against out-of-state bidders. *Maharg, Inc. v. Van Wert Solid Waste Management District,* 249 F.3d 544 (6th Cir. 2001), *pet. cert. filed,* 70 U.S.L.W. 3291 (Oct. 10, 2001) (No. 01-615) *Houlton Citizens' Coalition v. Town of Houlton,* 175 F.3d; *178 (1st Cir. 1999); Harvey & Harvey v. Delaware Solid Waste Authority, supra,* 68 F.3d 788. Others have held that regardless of the bidding process, a government entity may enter the market as a buyer of services from private companies without implicating the Commerce Clause, as long as certain criteria are met. *See, Huish Detergents, Inc. v. Warren County, Kentucky,* 214 F.3d 707 (6th Cir. 2000) (disposal ordinance and franchise agreement with private hauler unconstitutional absent expenditure of public funds); *SSC Corp. v. Town of Smithtown,* 66 F.3d 502 (2d Cir. 1995), *cert. denied,* 516 U.S. 1112 (1996) (town may contract with a single private company for collection of its residents' waste and direct that company through contract to go to a particular disposal facility, but town can not use its regulatory power to force other collecters to use preferred disposal location); *USA Recycling v. Town of Babylon,* 66 F.3d 1272 (2d Cir. 1995), *cert. denied,* 517 U.S. 1135 (1996) (town may "take over" collection and disposal and eliminate private market consistent with Commerce Clause even if it imposes sanctions for violating flow control ordinance); *Barker Brothers Waste, Inc. v. Dyer County Legislative Body,* 923 F.Supp. 1042 (W.D. Tenn. 1996) (market participation exception to Commerce Clause applies to flow control ordinances only if the government entity participates in *both* the collection and the disposal market). *But see, Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority,* 814 F.Supp. 1566 (M.D. Ala. 1993), *aff'd sub nom.*

Waste Recycling v. SE AI Solid, 29 F.3d 641 (11th Cir. 1994) (market participant exception does not apply to exclusive town contract for collection that designates disposal site).

While granting *certiorari* in this case will not resolve all of the confusion in the Courts of Appeals regarding the permissible parameters of local government participation in solid waste markets, it will provide clarity in one key area that has never been resolved by this Court, *i.e.*, whether local government discriminates against interstate commerce by expending public resources to comprehensively manage solid waste and provide for its disposal at public facilities. The Court below found that such a system was not the type of protectionist measure that implicates the Commerce Clause. The Third Circuit, however, in striking down New Jersey's system, ignored the public/private distinction found determinative in this case.* Other courts have done the same, without discussion of whether public ownership of the facility effected the Commerce Clause analysis. *See, Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993);

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* The Third Circuit analyzed the issue under the "market participant" exception to the Commerce Clause, finding that exception inapplicable because the DEP's regulations constituted "market regulation," inconsistent with market participation. *Atlantic Coast, supra,* 48 F.3d 717. However, DEP does not own any solid waste facilities, and never claimed that the State itself was the participant in the market. The County co-defendants in that case, however, did own facilities and did not promulgate the regulations found to be unconstitutional in *Atlantic Coast*. The Third Circuit did not address directly whether the county authorities' ownership of solid waste facilities brought them outside the strictures of the Commerce Clause.

Coastal Carting v. Broward County, Fla., 75 F.Supp. 2d. 1350 (S.D. Fla. 1999); *Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F.Supp. 1566 (M.D. Ala. 1993), *aff'd*, 29 F.3d 641 (11th Cir. 1994), *Cf. Southcentral Pennsylvania Waste Haulers' Association v. Bedford-Fulton-Huntingdon Solid Waste Authority*, 877 F. Supp. 935 (M.D. Pa. 1994).

This Court should grant *certiorari* to resolve this inconsistency. Furthermore, *amicus curiae* State of New Jersey urges the Court to resolve the question in favor of the Second Circuit's analysis. As the Second Circuit recognized, all of the Court's cases, including *Carbone*, focused on the local government's favoritism toward local businesses. 261 F.3d at 258. The Court cited the language in *Carbone* holding that "the town may not employ discriminatory regulation to give [the designated facility] an advantage over *rival businesses* from out-of-state," and that "states and local governments may not use their regulatory power to favor *local enterprise* by prohibiting patronage of out-of-state competitors of their facilities." *Id.* (citing 511 U.S. at 394). The Court also reviewed what it called "local processing cases," noting that even outside the solid waste context, this Court's dormant Commerce Clause cases have found "that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition." *Id.* at 261.

This interpretation is also consistent with the purposes of dormant Commerce Clause jurisprudence. As recognized by the Court below, the goal of the Commerce Clause is to prevent states from enacting measures that create advantages for in-state business at the expense of the national market, measures that amount to "economic protectionism." 261 F.3d at 261-2.

The Commerce Clause "does not prohibit all State action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*" *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (emphasis in original). The goal is to thwart "the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens...." *College Savings Bank v. Florida Prepaid Post Secondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999). The Commerce Clause was not intended, however, to prevent States or local governments from expending resources to benefit their citizens, even if it involves participating in industries that may be characterized as "commerce." Clarification of the reach of the Commerce Clause's limit on State authority is necessary to prevent the "guesswork about the constitutionality of proposed solid waste management schemes" noted by the Court below and the potential financial crises that may result if a local government makes the wrong guess.

This is particularly true where, as here, the industry directly impacts public health and welfare. As noted by Justice O'Connor in her concurrence in *Carbone*, "The Court generally defers to health and safety regulations because 'their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations.' " 511 U.S. at 404 (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444, n.18 (1978)).

Thus, for example, although there are many private security firms and their business certainly constitutes "commerce," it would not be considered an economic protectionist measure for a local government to provide police

protection to all buildings and facilities within its borders. However, if the local government passed a law requiring all buildings and facilities to utilize only the locally-based private security firm, the Commerce Clause might be implicated.

Similarly, when a local government decides to expend its resources to assume the responsibility for solid waste disposal, it does not, as Justice Souter argued in his *Carbone* dissent "differentiate between all local and all out-of-town providers of a service, but instead between the one entity responsible for ensuring that the job gets done and all other enterprises, regardless of their location." *Id.* at 411. *

Surely, where public health and welfare are concerned, the Commerce Clause does not prohibit a local government from deciding that it shall be the entity that ensures "that the job gets done." The goal of that constitutional provision was not to prevent government from expending its resources to protect its citizens from the vagaries of the open market in solid waste, which may include landfill closures, illegal dumping, environmental liability, and unregulated pricing. To protect billions of dollars in public expenditures incurred in the absence of a definitive ruling on this issue, and to prevent

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* Petitioner's argument that the *Carbone* majority considered and rejected the public/private distinction because it was discussed in Justice Souter's dissent was correctly rejected by the Court below. In his dissent, Justice Souter specifically stated that the issue was "ignored" by the majority, and it does appear that there was a dispute as to whether the Clarkstown facility could be fairly characterized as public. Thus, the majority's silence on the issue can hardly be construed as a holding that public ownership bears no relevance.

continued uncertainly for public officials on this issue, the Court should grant *certiorari* and uphold the decision of the Court below.

CONCLUSION

For the foregoing reasons, *amicus curiae* State of New Jersey respectfully urges this Court to grant *certiorari* and uphold the decision below.

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IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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WILLIAM RATHJE & CULLEN MURPHY, RUBBISH! THE ARCHAEOLOGY OF GARBAGE 9 (1992) 7

The New York State Association for Solid Waste Management ("Association" or "NYSASWM") submits this brief as *Amicus Curiae* opposing the petition for *certiorari*.

Consent of Parties

Petitioners and respondents have consented to the filing of this brief, amicus curiae.[1]

Interest of the Amicus

The Association is a nonprofit organization of governmental and municipal citizens and entities involved in the public management of municipal solid waste. The Association's brief in the court below was adopted in substantial part by the Second Circuit in the *United Haulers*[2] decision below. The Association, its members and its counsel are interested in principled, economically sound, and environmentally protective management of municipal solid waste in the public interest.[3]

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1. In accordance with Rule 37, the parties' letters of consent have been filed with the clerk of this Court, and this brief was authored alone by counsel, *pro bono publico*, for the *amicus* herein, with neither contribution on the brief nor financial contribution from any party.

2. *United Haulers et al. v. Oneida-Herkimer Solid Waste Management Authority, et al.*, 261 F.3d 245 (2d Cir. 2001).

3. Some articles describing why non-discriminatory flow control laws will benefit the public, by allowing democratic and constitutional "home-rule" over trash, include: Diederich, *Can Municipalities Manage Their Own Solid Waste?*, Environment Magazine (May 1995); Diederich, *In Light of Carbone: Who Owns Municipal Solid Waste?*, The New York Environmental Law Report (April 1995); Diederich, *Keep Democratic Rule over Trash*, ABA Section of Natural Resources, Energy and

(Cont'd)

It is the belief of your *amicus* that it is vital to the public interest that the decision of the Second Circuit be left to stand.

Argument Opposing Certiorari

There are three points crucial to this Court's decision whether or not to grant certiorari.

A. No Conflict with Carbone

First, is whether the United Haulers decision conflicts with this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), and thus violates the dormant aspect of the Commerce Clause.[4] As discussed within *United Haulers*, it most certainly does not.

Respectfully, it becomes obvious reading the majority and dissenting opinions that the debate among the Justices of this Court in *Carbone* was whether the facility being "favored" by local regulation was public (in which case the "flow control" would be permissible), or whether the regulation discriminated in favor of local business enterprise (and thus impermissible under this Court's "local grab" Commerce Clause jurisprudence[5]).

(Cont'd)
Environmental Law, Nov./Dec. 1994; Diederich, *Does Garbage Have Standing?—Democracy, Flow Control and Solid Waste Management*, 11 PACE ENVT'L L. REV. 157 (Fall 1993).

4. U.S. CONST., art. I, § 8.

5. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-9, p. 426 (2d ed. 1988).

It is basic law that State and local governments can provide monopoly public service. Whether such service is the provision of police or fire protection, educating children in public schools, or providing a public water or sewerage system, such governmental monopoly service does not infringe upon interstate commerce. Petitioners' attempt to label a fundamental police power activity—sanitation—as a business enterprise misinterprets the very nature and essential role of government.

The basic right of government to provide monopoly public service formed the theoretical underpinning of the debate among the Justices in *Carbone*. The distinction between monopoly public service and private commercial activity is not of minor dimension. Rather, it is the difference between a police force or private security service; public or private schools; public sewer or private septic systems; a fire department or some form of private fire control business. It is the difference between government acting to protect its citizens, and the citizenry or business undertaking this task on their own.

The Second Circuit explained, in this regard, how this Court's "local grab" jurisprudence supported the distinction between the public protecting itself by preferring its own waste management facilities (or through fair, open and competitive outsourcing), in contrast to government using regulation to "grab" business for local industry.

The Second Circuit describes the public self-management process as a "bottleneck." This can be visualized as governmental self-management within the bottle until such time as the Government allows the waste to exit (or flow) out of the municipal bottle and into the channels of interstate

commerce. In your *amicus* Association's brief in the Second Circuit, this "bottleneck" was depicted as a flow chart illustrating how municipal solid waste can be permissibly managed under the constraints of the Commerce Clause. *See* annexed Figure "1" attached as an Appendix hereto (indicating the "bottleneck" described by the Second Circuit). The flow diagram shows the "bottleneck" of monopoly public control of solid waste, and the option of outsourcing where local government "openly and competitively" employs the private sector (*e.g.*, *Harvey v. Harvey*;[6] *Houlton*[7]). The flow diagram also indicates that government can permissibly use the "market participant" exception (*e.g.*, *SSC Corporation*[8]), but that it is impermissible for government to use its regulatory powers to favor local industry (*Carbone* & "local grab" cases).

Thus, the court below wrote a decision fully in accord with this Court's Commerce Clause jurisprudence, which decision must be left to stand.

B. No Split among the Circuits

Petitioners second argument—that a split of decision exists among the circuits on the issue of governmental flow control—is unsupported. The *United Haulers* decision sets forth the relevant decisions, and amply demonstrates that no circuit has directly addressed this point, namely, the issue of

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6. *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *cert. denied*, 516 U.S. 1173 (1996).

7. *Houlton Citizen's Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999).

8. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 517 U.S. 1150 (1996).

whether governmental self-management of local solid waste violates the Commerce Clause. Moreover, two of the decisions which petitioners cite in support of a split among the circuits *pre-date Carbone*, and employ a "waste-is-an-article-of-commerce" rationale which was presented to, but not adopted by the Court in *Carbone*.[9] The case below is the only appellate decision which directly addresses and analyzes the question of flow control of a community's solid waste to its own public facilities.[10] This Court should give other circuits the opportunity to follow the *United Haulers* precedent, in which case there may be no need for this Court's involvement.

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9. Rather, such rationale was rejected by this court, by its acknowledgment that it is not so much the trash itself which is the commerce, but rather the service of processing it. *See Carbone*, *supra*, 511 U.S., at 391; *see also Does Garbage Have Standing*, *supra*, note 1, at introductory summary (which article analyzes a line of cases, some cited by petitioners, which base their decision on the false notion that trash is in and of itself an "article of commerce." *See, e.g.*, *Waste Systems Corp v. County of Martin*, 985 F.2d 1381 (8th Cir 1993) and *Waste Recycling Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D.Ala 1993), *aff'd, without opinion*, 29 F.3d 641 (11th Cir. 1994)).

10. The Second Circuit could also have employed other or additional reasoning to reach the same result: It could have asked the question "Who owns the trash?" with the answer being the local public, which is then entitled, through its public bodies, to keep control of such trash to self-manage it. In a similar vein, it could have applied principles of democracy, to allow the local public the choice to self-manage its own trash, as is arguably its federal right under the Guarantee Clause. *See* note 3 *supra*.

C. Fundamental, and Constitutional, Police Power Activity

Thirdly, because the instant case involves local government managing its own citizens' municipal solid waste, there simply is no question of protectionism in favor of local enterprise. Instead, there is the right of the public, under principles of both federalism and democracy (embodied in the Constitution's Guarantee Clause[11]), to manage its waste problems locally. Self-management of local garbage is a traditional and fundamental police power activity. It is essentially no different from using a police or fire department , a public school, sewer district to manage local crime, fire, illiteracy or human waste. The solid waste management system at issue can be likened to a sewer system, with the local solid waste haulers taking the role of the sewer pipes.

Moreover, public self-management of a community's solid waste—discarded material which is essentially a form of pollution—cannot be viewed as an infringement upon interstate commerce. Rather, what is involved is government managing local waste in a manner beneficial to the local citizenry, which self-management is also beneficial to neighboring communities and States, and is fully consistent with the policies and mandates which Congress set forth in RCRA subtitle D.[12]

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11. The assurance of State and local democracy can be viewed as embodied in the Guarantee Clause, promising to the States a "republican form of government." *See* U.S. Const. art. IV, § 4.

12. *See* Resource Conservation and Recovery Act § 1002 *et seq.*, 42 U.S.C. § 6901, *et seq.* (1988 & Supp. III 1991) [hereinafter "RCRA"]

Allowing governmental management of local waste will not cause the sky to fall. Petitioners' "sea change"[13] argument is belied by the fact that here government is merely performing a police power activity which municipal entities have undertaken by necessity through the ages—public sanitation. The decision below allows government to perform its essential and historically proven role.[14] Trash management is, after all, a paradigmatic police power activity.[15]

Congress has endorsed this governmental role. It is a role which protects the public interest, for if *every* community self-managed its own municipal trash so as to totally eliminate the existence of trash, the federal goals of RCRA would be obtained, and every community would benefit and applaud such achievement. No interstate "jealousies" would be excited. If every community adopted Respondents' comprehensive system, the nation would achieve better, environmentally sound and economically efficient trash

13. No "sea change" will occur if the decision below is left to stand. *Cf.*, Petition at p. 22. For example, the City of New York collects over 12,000 tons of residential trash per day, using Sanitation Department trucks. The decision below will not give New York City greater power than the public service monopoly it has always enjoyed.

14. *See generally*, WILLIAM RATHJE & CULLEN MURPHY, RUBBISH! THE ARCHAEOLOGY OF GARBAGE 9 (1992).

15. *See, e.g., Hybud Equip. Co. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated*, 455 U.S. 931, *cert. denied*, 471 U.S. 1004 (1985) ("[C]ontrol of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment . . . [and which ordinances] are rationally related to a matter of legitimate local concern.").

management, in complete harmony with the Commerce Clause and consistent with principles of federalism and democracy.

CONCLUSION

The decision below, upholding the State and local laws at issue, is consistent with principles of federalism by allowing democratic choices regarding local trash management and disposal. The laws at issue do not discriminate against or impede interstate commerce. Thus, the petition for *certiorari* must be denied.

Respectfully submitted,

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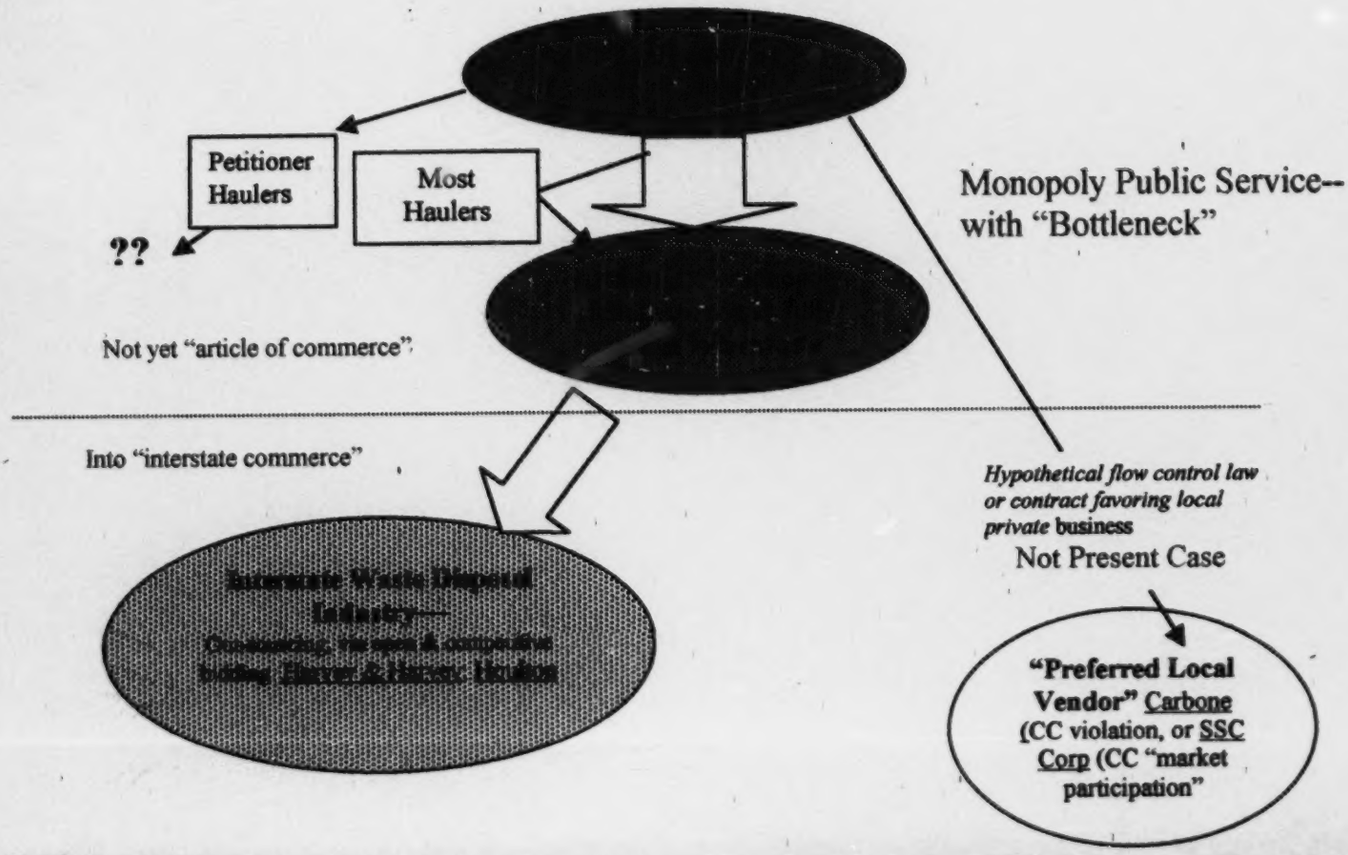
APPENDIX

BEST AVAILABLE COPY

Waste Flow Diagram **– *Fig. "1"***



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No. 01-686

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.,
Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, AMERICAN FOREST AND PAPER ASSOCIATION, INC., AMERICAN TRUCKING ASSOCIATIONS, INC., ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE PETITION

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INTEREST OF THE AMICI CURIAE

The National Solid Wastes Management Association ("NSWMA"), the American Forest and Paper Association, Inc. ("AF&PA"), the American Trucking Associations, Inc. ("ATA"), the Association of American Railroads ("AAR") and the National Association of Manufacturers ("NAM") respectfully submit this brief as *amici curiae* in support of the petition.[1]

NSWMA is a not-for-profit trade association whose 1700 member companies operate in all fifty states. Collectively, these private sector companies engage in nearly every aspect of solid waste management. NSWMA's members include collectors and transporters of solid waste; operators of solid waste treatment, storage and disposal facilities; waste recyclers; and firms providing legal, financial and consulting services to the waste management industry. NSWMA regularly represents its members in matters before the courts, Congress and regulatory agencies. It filed an *amicus* brief in support of the petitioner in the case of *C&A Carbone v. Clarkstown*, 511 U.S. 383 (1994), in which this Court held that Clarkstown, New York's flow control laws violated the dormant Commerce Clause.

AF&PA is the national trade association of the forest, paper and wood products industry. It represents companies engaged in growing, harvesting, and processing wood and wood fiber, manufacturing pulp, paper and paperboard

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. All parties have consented to this filing in letters on file with the Office of the Clerk of this Court.

products from both virgin and recycled fiber, and producing engineered and traditional wood products. AF&PA seeks to preserve the interstate market in recyclables, which is a primary source of raw material for many AF&PA members.

ATA is a nonprofit corporation that serves as the national trade association of the trucking industry. It has over 2,000 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA regularly advocates the trucking industry's position before the United States Supreme Court and other courts. ATA seeks to preserve the interstate market in solid waste and recyclable materials on behalf of the numerous ATA members already engaged in, or planning to become engaged in, the interstate transportation of such materials.

AAR is an incorporated nonprofit trade association whose members include the nation's major freight railroads and Amtrak. AAR's members operate approximately 75% of the rail industry's line haul mileage, produce 93% of its freight revenues, and employ 91% of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. Pertinent hereto, on behalf of some of their customers, AAR members transport waste and other refuse to and from a variety of locations throughout the United States, in excess of 900 million ton miles per year. Any court proceedings that impact this particular stream of commerce will greatly impact AAR members.

NAM is the nation's oldest and largest industrial trade association. It represents nearly 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all fifty states. NAM member companies and subsidiaries employ approximately 85% of manufacturing workers and produce over 80% of the nation's manufactured goods. NAM seeks to maintain open borders and free market competition between solid waste and recycling service providers in all fifty states, preserving the most cost-effective and environmentally protective solid waste disposal system in the world.

The common thread that unites the amici is their serious concern regarding the impact of the Second Circuit's decision on the functioning of the interstate market for solid waste and recycling services. Prior to this Court's decision in *Carbone*, the balkanization of that market was a major threat to the waste industry itself and to the businesses that depend on its services. By 1995, over 75% of the states had authorized flow control laws,[2] and local governments were rushing to take advantage of the opportunity to ensure the success of their local disposal facilities by preventing the waste generated in the locality from being taken anywhere else. The predictable result was an escalation of prices for solid waste disposal, as protected facilities set their rates without fear of competition. Moreover, a snowball effect was rapidly developing, as other localities were forced to respond by enacting their own flow control laws to protect

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[2] S. Rep. No. 104-52, at 5-6 (1995) (as of 1995, thirty-five states, the District of Columbia and the Virgin Islands directly authorized flow control, and an additional four states indirectly authorized it through local solid waste management plans, home rule or other mechanisms).

local facilities which previously had depended on out-of-state waste for their financial viability.

In *Carbone*, this Court unequivocally held that the challenged flow control ordinance discriminated against interstate commerce and that any "local problems," including health and environmental problems, could be solved by "the unobstructed flow of interstate commerce itself...." 511 U.S. at 393. However, localities with existing flow control laws did not acquiesce gracefully to this Court's decision. In addition to seeking legislation from Congress specifically authorizing flow control laws (which was vigorously opposed by a number of amici),[3] localities sought to

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[3] *See, e.g.*, Solid Waste Interstate Transportation Act of 2001, H.R. 1213, 107th Cong. § 2 (2001); Municipal Solid Waste Flow Control Act of 2001, H.R. 1214, 107th Cong. § 2 (2001); Solid Waste Interstate Transportation and Local Authority Act of 2001, S. 1194, 107th Cong. § 3 (2001); Solid Waste Interstate Transportation and Local Authority Act of 1999, H.R. 1190, 106th Cong. § 3 (1999); Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 663, 106th Cong. § 3 (1999); Municipal Solid Waste Interstate Transportation and Local Authority Act of 1999, S. 872, 106th Cong. § 5 (1999); Municipal Solid Waste Flow Control Act of 1997, H.R. 943, 105th Cong. § 2 (1997); H.R. Res. 349, 104th Cong. § 2 (1996); State and Local Government Interstate Waste Control Act of 1995, H.R. 2323, 104th Cong. (1995); Local Governments Flow Control Act of 1995, H.R. 1085, 104th Cong. § 2 (1995); Public Debt Relief Act of 1995, H.R. 2838, 104th Cong. § 2 (1995); Municipal Waste Flow Control Transition Act of 1995, S. 485, 104th Cong. § 2 (1995); Municipal Solid Waste Flow Control Act of 1995, S. 534, 104th Cong. § 202 (1995); Flow Control Act of 1994, H.R. 4683, 103d Cong. § 1 (1994); Flow Control Act of 1994, S. 2227, 103d Cong. § 2 (1994); *Interstate Transportation of Municipal Waste and Flow Control: Hearing on S. 533, S. 663 and S. 872 Before the Senate Comm. on Environment and Public Works*, 106th Cong. (1999);

(Continued ...)

perpetuate flow control by attempting to distinguish their particular laws from those struck down in *Carbone* and by making cosmetic changes to their ordinances. Another wave of litigation ensued, and the courts are once again "clogged with cases challenging restrictions on waste-related services, making garbage the modern legal battleground over the Commerce Clause." *Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 713 (6th Cir. 2000). The courts promptly overturned many of these laws,[4] and localities gradually have been brought into compliance with their Commerce Clause obligations.

Transportation and Flow Control of Solid Waste: Hearing Before the Senate Comm. on Environment and Public Works, 105th Cong. (1997); S. Rep. No. 103-322 (1994); H.R. Rep. No. 103-738 (1994).

[4] *See, e.g., Huish Detergents*, 214 F.3d at 715-16; *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir.), *reh'g and reh'g en banc denied*, 2000 U.S. App. LEXIS 5173 (8th Cir. Mar. 24, 2000); *Waste Mgmt., Inc. v. Metro. Gov't*, 130 F.3d 731 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders*, 48 F.3d 701, 712 (1995), *reh'g and reh'g en banc denied*, 1995 U.S. App. LEXIS 6454 (3d Cir. Mar. 28, 1995); *Coastal Carting Ltd. v. Broward County*, 75 F. Supp. 2d 1350 (S.D. Fla. 1999); *Randy's Sanitation, Inc. v. Wright County*, 65 F. Supp. 2d 1017 (D. Minn. 1999); *Condon v. Andino, Inc.*, 961 F. Supp. 323 (D. Me. 1997); *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd mem.*, 29 F.3d 641 (11th Cir. 1994); *City of Paterson v. Passaic County Bd. of Chosen Freeholders*, 753 A.2d 661 (N.J. 2000); and *Heier's Trucking, Inc. v. Waupaca County*, 569 N.W.2d 352 (Wis. Ct. App. 1997).

The decision of the Second Circuit, Pet. App. at 1a-33a, threatens to undo much that has been accomplished. It provides a blueprint by which a municipality, county or state can readily re-activate flow control as to any publicly owned facility and can extend flow control to privately owned facilities by the simple expedient of restructuring its financial arrangement with such facility to vest ownership in a public entity. Given the active and continued resistance of many local, county and state governments to this Court's *Carbone* decision, *amici* have no doubt that local, county and state governments will be quick to take advantage of this perceived new opportunity. Prompt review by the Court is thus essential to ensure that the interstate trade in solid waste and recyclables and the constitutional principles underlying the Commerce Clause are not once again thwarted.

SUMMARY OF ARGUMENT

Unless the decision of the court below is promptly reversed, the interstate market in solid waste and recyclables will be seriously disrupted. Almost half of the nation's waste facilities currently are owned by public entities.[5] The Second Circuit's decision, by providing a blueprint for governments to evade *Carbone*, virtually ensures that flow control laws promptly will be re-enacted with respect to many of those facilities, thereby locking millions of tons of waste out of the interstate market. Such effects will not be limited to states in the Second Circuit. Waste from those states currently is moving to facilities in at least five other Northeastern and Midwestern states. Moreover, a snowball effect is inevitable,

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[5] R.W. Beck & Chartwell Information Publishers, *Size of the United States Solid Waste Industry, Directory & Atlas of Solid Waste Disposal Facilities 2001* Tbl. ES-2 at ES-3 (Apr. 2001) (47.5% of waste facilities are publicly owned).

as localities faced with the sudden loss of solid waste on which their own waste facilities depend seek to protect their own financial interests, both by reinstituting flow control for their publicly owned facilities and by converting those that are now privately owned. In addition, facilities designated under flow control ordinances serve as a source of substantial financial revenue to hard-pressed jurisdictions, which, based on past experience, can be expected to charge above-market rates for waste disposal.

The Second Circuit's decision is at odds with both modern business realities and this Court's current Commerce Clause jurisprudence. By making the constitutionality of a flow control ordinance turn on the technical issue of ownership of the favored facility, the court below has ignored the practical economic effect of the ordinance – which this Court repeatedly has emphasized is the key determinant when analyzing issues of discrimination against interstate commerce. *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987) ("*ATA*"); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The effect of flow control on competing out-of-state waste facilities and on the haulers, interstate trucking companies, railroads and barge lines that seek to transport waste to those facilities is the same regardless of whether the favored local facility is privately or publicly owned. The effect also will be felt by the generators who use these facilities. This Court, in *Carbone*, already has concluded that the economic effects of flow control are "interstate in reach," 511 U.S. at 389, and that such laws discriminate against interstate commerce. A difference in the ownership of the facilities favored by a flow control ordinance cannot change that reality.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION, IF NOT PROMPTLY OVERTURNED, WILL RESULT IN SERIOUS DISRUPTIONS TO THE INTERSTATE MARKET IN SOLID WASTE DISPOSAL SERVICES.

Since *Carbone* was decided, it has been understood by all parties with a stake in solid waste disposal – including municipalities and counties as well as solid waste facility operators, recyclers and haulers – to apply to privately owned and publicly owned facilities alike. This seemed apparent from *Carbone* itself, where the transfer station protected by the flow control ordinance was privately owned at the time of the litigation but was scheduled to revert to municipal ownership shortly after the Court issued its decision.[6] Yet despite the filing of an amicus brief urging this Court to limit its decision to privately owned facilities[7] and a vigorous dissent urging that the Clarkstown ordinance be upheld because the "one proprietor so favored is essentially an agent of the municipal government,"[8] the majority opinion did not even hint that the constitutionality of the ordinance might hinge on whether the case was decided before or after Clarkstown exercised its option to purchase the facility.

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[6] *Carbone*, 511 U.S. at 383; *Carbone*, R. on Appeal at 128.

[7] *See* Brief of *Amicus Curiae* City of Springfield, Missouri at 11-15, *Carbone* (No. 92-1402).

[8] *Carbone*, 511 U.S. at 416 (Souter, J., dissenting). Moreover, the Clarkstown ordinance on its face referred to the designated transfer station as "the Town of Clarkstown solid waste facility...." *Id.* at 396.

In the aftermath of *Carbone*, at least three courts of appeals and two district courts invalidated flow control laws where the facility at issue was publicly owned.[9] Moreover, two district courts that had occasion to address the significance of public versus private ownership of waste facilities both concluded that public ownership made no difference.[10]

In this context, the decision below threatens an immediate and massive disruption of the post-*Carbone* solid waste market that will extend far beyond the Second Circuit

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[9] *See U & I Sanitation*, 205 F.3d at 1065-66, 1071-72 (city-owned transfer station); *Waste Mgmt.*, 130 F.3d at 733, 736 (publicly owned waste-to-energy facility); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 794 (3d Cir. 1995) (county-owned landfills), *cert. denied*, 516 U.S. 1173 (1996); *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, No. 5-95-228, 1996 WL 612465, at **1-3, 10 n.13 (D. Minn. July 2, 1996) (waste-to-energy facility owned by waste district); and *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152, 154 (D. Conn. 1996) (publicly owned waste disposal plant).

[10] *See Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntington Solid Waste Auth.*, 877 F. Supp. 935, 943 (M.D. Pa. 1994) (invalidating a flow control law and stating that the Court was "not persuaded that the public nature of the [designated] facility changes the applicable analysis"). *See also Pine Ridge Recycling v. Butts County*, 855 F. Supp. 1264, 1275 (M.D. Ga. 1994) (finding that local government officials "engineered to prohibit a competitor from entering the waste disposal market" in order to subsidize construction of a new publicly owned landfill, and explaining that "[i]t should make little difference that the [waste authority] owns its [landfill] currently and the facility in *Carbone* would be turned over to the town after five years of private operation. Such a distinction would focus on form and ignore substance.").

itself. First, as to the immediate impact, the states that lie within the Second Circuit – New York, Connecticut and Vermont – are among the most prolific waste-exporting states in the Nation, and the states that currently receive waste from New York, Connecticut and Vermont include states located in four Circuits. New York alone exported nearly 7 million tons of waste in 2000, including 4.7 million tons to Pennsylvania, 1 million tons to Virginia, 648,000 tons to New Jersey, and 466,000 tons to Ohio. Connecticut exported over half a million tons of waste in 2000, including 428,494 tons to Pennsylvania, 125,988 tons to Ohio, and some to New Jersey. Vermont exported 88,350 tons of waste in 1999, primarily to New Hampshire and New York. [11]

Moreover, a high percentage of the 717 waste facilities in the Second Circuit are publicly owned: over 90% in Connecticut, over 75% in New York, and over 80% in Vermont. Thus, if the Second Circuit's decision is not overturned, local governments in these states will be free to re-institute flow control laws with respect to over 80% of the transfer stations, over 70% of the landfills, and over 60% of the waste-to-energy facilities in the region, thereby depriving competitors in at least five other states of the solid waste now moving to out-of-state facilities in the free interstate market.[12] Overall, millions of tons of solid waste are susceptible to immediate "hoarding" by trash-hungry localities in the Second Circuit if the decision below is allowed to stand.

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[11] James E. McCarthy, *CRS Report for Congress: Interstate Shipment of Municipal Solid Waste: 2001 Update* at Tbl. 4 (July 19, 2001).

[12] Chartwell Information Publishers, *The Directory & Atlas of Solid Waste Disposal Facilities 2000*, at 150-64, 559-634, 852-65 (5th ed. 2000).

Indeed, the entire intricate web of solid waste companies and facilities that provide cost-effective service to residents, businesses and local governments in the Northeast and throughout the United States will be impacted adversely unless the Second Circuit decision is overturned. Many local and national waste collection companies in the Northeast and elsewhere collect trash and dispose of it at transfer stations owned by private waste companies. These companies, in turn, contract with long-haul trucking companies, railroads or barges to transport trash from the transfer stations to landfills and waste-to-energy plants in other states.[13] In New York, numerous waste collectors operating in counties with publicly owned disposal facilities currently dispose of waste at facilities in other states. If the Court does not overturn the decision below, local governments in those counties will be able to initiate monopolies, or reestablish their pre-*Carbone* monopolies, on solid waste disposal services. This will have immediate adverse consequences for companies that have acquired, constructed or expanded state-of-the-art facilities in other states in reliance on the assumption that they would be able to compete freely in the interstate market for the solid waste needed to operate those facilities efficiently.

The Second Circuit's decision similarly threatens the interstate market in recyclables, as flow control measures often encompass recyclable materials in addition to solid

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[13] In New York City alone, more than 150 licensed haulers collect commercial and industrial solid waste. Virtually all of the thousands of tons of New York City solid waste collected daily by these haulers is processed at transfer stations and disposed of at landfills or waste-to-energy plants in New Jersey, Pennsylvania, Virginia, Ohio and other states. *See* Eric Lipton, *City Trash Follows Long and Winding Road*, N.Y. Times, Mar. 24, 2001.

waste.[14] Flow control measures restricting delivery of recyclables to local, publicly owned facilities to the detriment of competing out-of-state facilities will seriously disrupt the interstate market for recyclables and the industries that depend on that market.[15]

Counties and municipalities in other Circuits can hardly be expected to stand idly by while those in the Second Circuit take advantage of their new-found ability to hoard waste for their publicly owned facilities. In Pennsylvania, for example, which received 4.7 million tons of waste from New York in 2000, or in other states, a loss of New York-origin waste will undoubtedly lead to flow control laws as local governments act to hoard all of their own "home-grown" product. The resulting spiral of protectionist legislation is precisely the evil that *Carbone* was intended to halt. *See Carbone*, 511 U.S. at 390 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.").

Nor will the effects of the Second Circuit's decision be limited to those facilities that are publicly owned at this moment in time. New facilities will undoubtedly be structured so as to incorporate public ownership. Moreover, there is nothing to prevent a county or municipality that is currently providing financial support to a privately owned facility (as Clarkstown did in *Carbone*) from restructuring its

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[14] In the case at bar, the local flow control ordinances apply to both solid waste and recyclables. Pet. App. at 5a-6a.

[15] *See, e.g., U & I Sanitation*, 205 F.3d at 1069 (discussing the interstate effect of flow control on the recyclables market).

relationship with the private company so as to vest ownership in a public body – and thereby make itself eligible for flow control. Under the Second Circuit's decision, there is no requirement that the waste facility be publicly owned from the outset. Presumably a formerly private facility converted to a publicly owned facility would be entitled to the benefit of flow control laws once the conversion had been accomplished.[16] Nor does the Second Circuit's decision require the city or county itself to become the owner of the facility. Indeed, in this case the two counties involved created a "waste management authority" to acquire ownership of the facilities.[17] And because the "public owner" is free under the Second Circuit's decision to hire a private company to actually operate the facility,[18] there is little, if any, disincentive to conversion.

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[16] Under the Second Circuit's rationale, it would appear that even Clarkstown, New York – whose flow control ordinance was declared unconstitutional by this Court in *Carbone* – could attempt to argue that its ordinance will become constitutional the moment it exercises its option to purchase the facility.

[17] Under the agreement between the Counties and the waste management authority, the Authority is to manage and dispose of all solid waste within the Counties and operate the local energy recovery facility and recycling center. In return, the Counties guarantee the Authority's operating costs and debt service payments. Pet. App. at 4a-5a. As a practical matter, such an arrangement is virtually indistinguishable from the arrangement in *Carbone* between the city and the owner of the favored facility.

[18] In the case at bar, the Authority chose to operate four of the five waste facilities itself, while contracting with a privately owned company to operate the fifth facility. Pet. App. at 6a-7a.

Given the enormous financial benefits that flow control laws can bring to a local government, there can be little doubt that counties and municipalities will quickly move to take advantage of the conversion option wherever possible. While this will necessarily require the cooperation of existing private owners, the monopoly profits made possible by flow control should be more than enough to outweigh the costs of conversion and make the conversion desirable for both the local government and the private owner. Thus, the financial balance is likely to weigh heavily in favor of conversion, further exacerbating the pernicious effects of the decision below.

II. THE SECOND CIRCUIT'S EMPHASIS ON FACILITY OWNERSHIP IS AT ODDS WITH MODERN BUSINESS REALITIES AND THIS COURT'S CURRENT COMMERCE CLAUSE JURISPRUDENCE.

The essential premise of the Second Circuit's decision is that there is such a fundamental difference between privately owned and publicly owned waste facilities that a different set of Commerce Clause principles should apply. This premise, however, is simply wrong. In today's world, public and private waste facilities are equal in the eyes of regulators and the market. The decision as to whether a particular facility should be structured as a publicly owned or privately owned entity is, but for the Second Circuit's decision, typically driven by practical business considerations, such as the most advantageous financing mechanism, potential tax consequences, and potential liability issues, that are wholly unrelated to the theoretical concepts that underlie the Second Circuit's decision.

In this context, it makes no sense to conclude, as did the Second Circuit, that the constitutionality of flow control laws enacted to funnel all trash in the jurisdiction to a local facility

should turn on whether that facility is publicly or privately owned. This is highlighted by the fact that in over 500 counties throughout the United States, including more than thirty-five counties in New York alone, there is a mix of privately owned and publicly owned waste facilities.[19] In such counties, private sector landfills, waste-to-energy facilities and transfer stations compete directly with publicly owned facilities for solid waste. Under the Second Circuit's decision, a flow control law would be valid as to the publicly owned facilities in these counties and invalid as to the privately owned facilities, even though the difference in ownership has no practical impact either on the way in which the flow control law affects interstate commerce or on the day-to-day operation of the facilities. Constitutionality would turn not on an ordinance's effect on interstate commerce, but on the mere happenstance of who holds ownership in the particular facilities.

This myopic focus on ownership is at odds with both the general thrust of modern business law and this Court's current Commerce Clause jurisprudence. From the business law perspective, the clear trend is to look to the substance of a transaction, rather than technical ownership. A prime example is found in Article 9 of the Uniform Commercial Code ("UCC"), which has been adopted by all fifty states and the District of Columbia. Since 1962, the UCC has provided that the location of title to collateral (*i.e.*, ownership) generally is immaterial for purposes of determining the rights and duties of parties to a secured transaction.[20] This simply

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[19] *Directory & Atlas of Solid Waste Disposal Facilities 2000*, *supra* note 12, at 559-634.

[20] *See* U.C.C. § 9-202 (2000).

reflects the reality that property ownership is no longer of talismanic significance in business transactions.

The Second Circuit's "form over substance" approach is also contrary to this Court's current Commerce Clause jurisprudence. Addressing the Commerce Clause issues raised by certain state taxes on interstate motor carriers, this Court in *ATA* emphasized that it had "'moved toward a standard of permissibility of state taxation, based upon its actual effect rather than its legal terminology.'" 483 U.S. at 295 (quoting *Complete Auto Transit v. Brady*, 430 U.S. 274, 281 (1977)). Eschewing the "metaphysical approach to the Commerce Clause that focused primarily on the character of the privilege rather than the practical consequences of the tax," *id.* at 294-95, the Court evaluated the constitutionality of the challenged taxes on the practical basis of "whether the tax produces a forbidden effect." *Complete Auto Transit*, 430 U.S. at 288. The same approach was followed in *Carbone*, where this Court focused on the fact that the "economic effects [of the flow control law] are interstate in reach" and concluded that "[t]hese economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause." 511 U.S. at 389.

From a practical standpoint, it is clear that the "effect" of local flow control laws on interstate commerce is no different when the favored local facility is publicly owned than when it is privately owned. In either case, the "guarantee of a free trade area among States," 483 U.S. at 281, is violated when a local government forces all trash in its jurisdiction to go to a local facility. From the perspective of the out-of-state waste facilities that can no longer compete for trash generated in a particular county or municipality, it is irrelevant whether the local facility that is the beneficiary of the flow control ordinance is owned by a private entity or by the local waste authority. In either event, the "protectionist effect of the ordinance," *Carbone*, 511 U.S. at 392, is the same – the

locally generated waste is hoarded for the benefit of the local facility and the out-of-state competitors are shut out of the market.

Similarly, the effect on the local trash haulers is the same, regardless of whether the facility designated by the flow control laws is publicly owned or privately owned. In either case, those haulers who had been hauling trash to out-of-state waste facilities will now have to take that trash to the designated local facility – and pay the higher tipping fee charged by that facility.[21] They too are being deprived of access to the interstate market for solid waste services, contrary to the precepts of the Commerce Clause.

Regardless of whether flow control laws favor publicly or privately owned facilities, the ripple effect of such laws will be felt throughout the interstate transportation industry. A revitalization of flow control will prevent railroads and barges from accessing the interstate market for solid waste services. Railroads and barge lines increasingly are entering into contracts for the long-distance transport of high volumes of trash to out-of-state disposal facilities. By forcing waste to be taken to local facilities, flow control laws of the sort permissible under the Second Circuit's decision will adversely impact those railroads and barges already engaged in, or planning to become engaged in, the interstate transportation of waste by rail and inland waterways, respectively.

The Second Circuit's decision will affect not only those businesses specifically engaged in the interstate trans-

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[21] As the Second Circuit itself recognized in the case at bar, "[e]ven the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides." Pet. App. at 9a.

portation of waste, but the multitude of ordinary businesses that generate waste. Most obviously, the institution – or reinstitution – of local government monopolies over solid waste disposal will prevent such waste generators from reaping the benefits of a competitive marketplace for disposal services, including the ability to shop for price, quality of service, and indemnification from environmental liability.

The Second Circuit's belief that a flow control law forcing trash to go to a publicly owned facility is "less likely to give rise to retaliation and jealousy from neighboring states," Pet. App. at 28a, than one that forces trash to go to a privately owned facility is simply naïve. The effect on an out-of-state waste facility that is shut out of a market by flow control is the same, regardless of who owns the favored facility, as is the effect on the municipality or county in which that out-of-state facility is located. A local government in a neighboring state that finds its financial well-being jeopardized by the loss of business experienced by its own waste facility is unlikely to eschew "retaliatory" measures simply because the flow control law responsible for its problems is directing waste to a publicly owned, rather than a privately owned, facility. Realistically, each local jurisdiction will act to protect its own interests – including, when necessary, retaliatory measures against other localities. This is precisely what the Commerce Clause was intended to prevent.

CONCLUSION

For the reasons stated herein, the petition for certiorari should be granted and the decision below should be reversed.

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No. 01-686

In the Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., AND INGERSOLL PICKUP INC.

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, AND COUNTY OF HERKIMER

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In this case, an unusually broad range of entities have made the identical point that there is uncertainty in the law regarding flow control ordinances and that failure to resolve that uncertainty will have dramatic, deleterious consequences. These entities include the Second Circuit itself, which recognized that the "missing pieces to the constitutional puzzle often force states and municipalities to engage in guesswork about the constitutionality of proposed solid waste management schemes, which are expensive and time-consuming to implement" (Pet. App. 12a); the State of New Jersey, which filed an amicus brief supporting certiorari and asserting that "[t]he legal uncertainty regarding permissible government regulation of solid waste collection and disposal has compounded" New Jersey's waste management problem (Brief of Amicus Curiae State of New Jersey in Support of the Petition for Certiorari (hereinafter "New Jersey Brief") at 1); and a wide variety of business groups that have expressed "serious concern regarding the impact of the Second Circuit's decision on the functioning of the interstate market for solid waste and recycling services" and urge "[p]rompt review by the Court * * * to ensure that the interstate trade in solid waste and recyclables and the constitutional principles underlying the Commerce Clause are not once again thwarted" (Brief of *Amici Curiae* National Solid Wastes Management Association, American Forest and Paper Association, Inc., American Trucking Associations, Inc., Association of American Railroads and National Association of Manufacturers in Support of the Petition (hereinafter "Industry Amicus Brief") at 3, 6).

For its own part, respondent acknowledges (Opp. 4) that the issue presented in the petition is "potentially interesting."[1]

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[1] Of the three respondents, only Oneida-Herkimer Solid Waste Management Authority has filed an opposition. The County of

And, even more telling, an association of which respondent is a member has taken the unusual step of filing an amicus brief in opposition to certiorari contending that "it is vital to the public interest that the decision of the Second Circuit be left to stand." Brief of Amicus Curiae the New York State Association for Solid Waste Management in Support of Respondents at 2. This statement is a compelling indication that NYSASWM expects the Second Circuit's ruling to have implications well beyond Oneida and Herkimer Counties.

Although recognizing the "potentially interesting" nature of the question presented and acknowledging New Jersey's "desire to have the Court grant review" (Opp. 5), respondent offers a range of reasons for denying certiorari. None warrants allowing the "legal uncertainty" about which New Jersey has expressed concern to fester any longer.

1. Respondent's principal ground for denying the petition is the fact that the case is technically interlocutory. Of course, this Court's "cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts." *Mazurek v. Armstrong,* 520 U.S. 968, 975 (1997) (per curiam). Indeed, during the past few Terms this Court has regularly granted certiorari in cases in which federal courts of appeals reversed summary judgments or dismissals and remanded for further proceedings. See, *e.g., Toyota Motor Mfg., Kentucky, Inc. v. Williams,* No. 00-1089, cert. granted, 121 S. Ct. 1600 (2001) (granting certiorari to review reversal of summary judgment); *TRW, Inc. v. Andrews,* 122 S. Ct. 441, 446 (2001) (Court granted certiorari to review reversal of summary judgment); *Correctional Servs. Corp. v. Malesko,* 122 S. Ct. 515, 518 (2001) (Court granted certiorari to review reversal of dismissal); *Norfolk Shipbuilding & Drydock Corp. v. Garris,* 121 S. Ct. 1927, 1929 (2001) (Court granted certiorari to review reversal of dismissal); *New York Times Co. v. Tasini,*

Oneida has filed a waiver and, to our knowledge, the County of Herkimer has not filed anything.

121 S. Ct. 2381, 2386-2387 (2001) (Court granted certiorari to review reversal of summary judgment). See also *National R.R. Passenger Corp. v. Morgan*, No. 00-1614, cert. granted, 121 S. Ct. 2547 (2001) (granting certiorari to review legal ruling that resulted in reversal of jury verdict and remand for a new trial).

As the leading commentators explain, "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." R. STERN ET AL., SUPREME COURT PRACTICE § 4.18 (8th ed. 2002) (forthcoming). That is precisely the situation here. As the three amicus briefs reflect, there can be no denying that the Second Circuit has decided an important issue that is worthy of review. Nor can there be any doubt that this Court's intervention could "hasten or finally resolve the litigation": If the Court were to reject the Second Circuit's public/private distinction, the case would be controlled by *Carbone* and the summary judgment would therefore almost certainly be reinstated, leaving only the issue of damages to be resolved on remand.

On the other side of the ledger, there is virtually nothing to be gained by waiting. To begin with, respondent is mistaken in suggesting (Opp. 4) that the "ultimate resolution" of the issue presented in the petition "would be better decided on a factual record that conveys a complete picture." The Second Circuit has held, as a matter of law, that *Carbone* does not apply to publicly owned facilities. The district court's mandate is limited to applying the *Pike* test. Any "factual record" developed in the district court cannot and will not be used to revisit the Second Circuit's legal determination that the virtually *per se* rule of invalidity is inapplicable to ordinances that require that waste be delivered to publicly owned facilities.

Moreover, notwithstanding respondent's assertion (Opp. 1) that "further proceedings in the district court are required to

develop the factual record necessary to determine whether the ordinances in question violate the Dormant Commerce Clause," the Second Circuit has already made it more than clear that petitioners have little hope of prevailing under the *Pike* test. That court twice indicated that it was "tempt[ed]" to hold that the ordinances are lawful under the *Pike* test "as a matter of law." Pet. App. 31a, 32a. Although ultimately not going that far, it went just up to the line, emphasizing to the district court that (i) it is "well-settled" that "waste disposal is a traditional local government function" (*id.* at 31a); (ii) the interests served by municipal waste management programs are "compelling" (*id.* at 32a (internal quotation marks omitted)); and (iii) "the fact that a municipality is acting within its traditional purview must factor into the district court's determination of whether the local interests are substantially outweighed by the burdens on interstate commerce" (*ibid.*). In the face of such unambiguous direction from the court of appeals, the proceedings on remand are likely to be little more than a formality. And, needless to say, if the district court does follow the Second Circuit's clear lead, the outcome of the ensuing appeal will be a foregone conclusion. But the whole process could take another few years, if not longer. Meanwhile confusion as to the validity of flow control ordinances both in the Second Circuit and elsewhere would continue unabated — if not be exacerbated as other local governments seek to follow the Second Circuit's roadmap for circumventing *Carbone*. In such circumstances, prudential considerations favor granting certiorari, not delaying it.

2. Respondent next attempts to distinguish *Carbone* on a variety of grounds, some of which are flatly wrong and others of which are distinctions that make no legal difference.

First, respondent observes (Opp. 8) that the ordinances in this case, unlike the one in *Carbone,* do not have the effect of requiring waste generated outside the counties to be processed locally. But *Carbone* did not turn on the fact that the flow control law in that case had the effect of requiring the petitioner

to bring out-of-state waste to the town's facility. Instead, the Court broadly held that "the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town." 511 U.S. at 391. See also *id.* at 389 ("[E]ven as to waste originant in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market."); *id.* at 392 (challenged ordinance "hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility"); *ibid.* ("The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.").

Second, respondent observes (Opp. 8) that, unlike in *Carbone,* here "there is no local operator receiving any arguable benefit from the local legislation." Although this is really just a short-form version of respondent's argument on the merits, it is notable that respondent ignores entirely the fact that in *Carbone* the preferred facility was scheduled to become publicly owned within a year. It is inconceivable that this Court expected its holding in *Carbone* to be applicable only for that remaining year.

Third, respondent suggests (Opp. 9) that it has greater responsibilities for safe disposal of the waste it receives than did the town in *Carbone*. Not only is that assertion irrelevant to the question whether the ordinances discriminate, but it also ignores the fact that Clarkstown raised — and this Court rejected — the contention that its flow control ordinance was necessary to ensure safe disposal of waste generated within the town (see 511 U.S. at 393).

Fourth, respondent contrasts its facilities, which it asserts "were planned and constructed after a long and deliberative public process," with Clarkstown's ordinance, which it characterizes as a "quick fix." Opp. 9. Again, this distinction

is utterly irrelevant to the question whether the challenged ordinances discriminate. In any event, as a side-by-side comparison will reveal, the ordinance in *Carbone* is no less thorough than the ordinances at issue here.

Fifth, respondent contends (Opp. 9-10) that the purpose of its ordinances is to manage waste publicly, while the purpose of Clarkstown's ordinance was to "ensure the consummation of private commerce." Once again, this distinction is irrelevant to the question whether the ordinances discriminate against interstate commerce. Moreover, respondent ignores the fact that Clarkstown's ultimate plan was to take title to the transfer station once the private company that built it had recouped its investment.

3. We pointed out in the petition (at 14, 19-22) that, if allowed to stand, the Second Circuit's decision would surely encourage local governments in other states to adopt flow control ordinances. Respondent answers (Opp. 11) that "[t]he absence in the Oneida-Herkimer legislation of any interstate reach to capture waste generated in other states largely eliminates any risk of retaliatory action by a neighboring state" and that "retaliation will not occur because Oneida-Herkimer is simply exercising its municipal power, derived from the sovereign power of the State of New York, to provide the same sort of governmental service which all other states have traditionally provided to their citizens." Whether labeled "retaliation" or "self-interest" or "self-preservation," however, it simply is undeniable that, if given the opportunity to impose flow control and thereby extract monopoly prices, many municipalities throughout the country will do so. See Industry Amicus Brief at 6-7 ("a snowball effect is inevitable, as localities faced with the sudden loss of solid waste on which their own waste facilities depend seek to protect their own financial interests, both by reinstituting flow control for their publicly owned facilities and by converting those that are now privately owned"); *id.* at 12 ("In Pennsylvania, for example, which received 4.7 million tons of waste from New York in

2000, or in other states, a loss of New York-origin waste will undoubtedly lead to flow control laws as local governments act to hoard all of their own 'home-grown' product.").

4. Respondent next invokes *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306 (1905), and the Resource Conservation and Recovery Act ("RCRA") for the proposition that both Congress and this Court have recognized "the traditional power of states and local governments to regulate for the provision of comprehensive waste services." Opp. 11. Of course, neither recognized an entitlement to discriminate against interstate commerce, which is what *Carbone* and this case are about.[2]

5. Respondent urges the Court to ignore the inconsistency of the Second Circuit's decision with the many decisions that have invalidated statutes that required waste to be processed at local, publicly owned facilities, stating (Opp. 13) that those cases involved "a variety of particular problems, proposed solutions, regulatory philosophies, and difficulties with the private sector" and that "[t]he waste management challenges facing" these geographically "diverse" localities "were each unique and reflective of local conditions." To begin with, the variations asserted by respondent are overblown to say the least. The flow control ordinances in the various cases all had the underlying objective of securing a dependable volume of waste in order to guarantee funding for a local waste facility. In any event, as we find ourselves repeating, the kind of differences to which respondent points simply are not relevant to the question whether the challenged ordinances discriminate.

Respondent also asserts (Opp. 14) that the cases we cited "have not been free of confusion or debate over ownership or local private benefit, and reviewing courts have often found

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[2] It merits noting in this regard that in *Carbone* Clarkstown and its amici placed heavy reliance on both *California Reduction* and RCRA to no avail.

alternate grounds for decision." Respondent offers no example in support of this *ipse dixit*. It simply isn't so.

6. Respondent concedes (Opp. 15) that the market participant doctrine is inapplicable to the challenged ordinances. It nevertheless sees no tension between that concession and the Second Circuit's holding that the mere fact of government ownership of the preferred facility precludes a finding of discrimination against interstate commerce. The tension is this: The function of the market participant doctrine is to put state and local governments on ***an even footing*** with private businesses when they act as market participants. The Second Circuit's rule, however, allows local governments to use their regulatory powers to give themselves a competitive advantage — indeed, to eliminate competition entirely — subject only to the deferential *Pike* balancing test. The Court's caution against expanding the market participant doctrine too broadly (*South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984) (plurality op.)) is of little significance if it can be circumvented simply by holding that a state or local government does not discriminate against interstate commerce when it favors a business it owns rather than one that is privately owned.

Respondent's contention (Opp. 15) that the antitrust laws would limit the circumstances in which local governments would be able to take advantage of this incongruity is only partly correct. First of all, as one of its own cases reflects, states are immune entirely from the antitrust laws. *Parker v. Brown*, 317 U.S. 341 (1943). Accordingly, the antitrust laws would not prevent state governments from establishing their own businesses and then excluding competition. Second, as respondent's other case indicates, local governments are free to engage in anticompetitive conduct if authorized by their states to do so. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 414-417 (1978) (plurality op.). Given the proliferation of state statutes authorizing the imposition of flow control (see Pet. 19 n.5), it is hardly alarmist to suggest that the

Second Circuit's decision could encourage states to authorize anticompetitive action by their subdivisions in other contexts.

7. Finally, respondent deems "hyperbol[ic]" our contention that the Second Circuit's decision will embolden municipalities around the country to reinstitute flow control ordinances that were struck down or abandoned in the wake of *Carbone* and/or enact new ones. Opp. 15. According to respondent, "[n]othing about flow control makes it easier for municipalities to site and build waste disposal facilities within their jurisdictions" (*ibid.*), and "local governments which have managed to find effective solutions which do not involve siting, building or acquiring public facilities are not likely to reverse course" (*id.* at 16). This misses the point. Whether or not municipalities are likely to build new facilities (and we think it is obvious that, so long as people continue to produce waste, at least some localities will have to), there are already hundreds, if not thousands, of communities around the country that have existing facilities that are strained for funding. That is no doubt what prompted New Jersey to file an amicus brief supporting certiorari and stating: "Nowhere is an answer to this open question needed more than in the State of New Jersey, where over $200 million has already been expended from the State Treasury to prevent defaults on public debt obligations and where over $1 billion in public solid waste debt remains outstanding." New Jersey Brief at 2. We might add only that an answer is needed by communities, haulers, generators, and disposal, processing, and recycling facilities throughout the country as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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